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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

EDMOND PFOTZER AND E. JOHN PFOTZER,
CO-PARTNERS

Petitioners

VS

UNITED STATES

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF CLAIMS

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E. JOHN PFOTZER
Petitioners pro se

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QUESTIONS PRESENTED FOR REVIEW

1. Whether as a matter of law petitioners were arbitrarily, erroneously, and wrongfully denied their constitutional rights to "due process" by the United States Court of Claims, pursuant to their "PETITION" filed in said Court on 5 July 1972. The latter as containing petitioners' bifurcated claims involving their "breach of contract claims" submitted under 28 U.S.C. 1491, and collaterally their administrative claims involving the Wunderlich Act (68 STAT. 81 - 41 U.S.C. Sections 321 and 322).

2. Whether the Court of Claims, in its denial of "procedural due process" to petitioners had arbitrarily and wrongfully concluded that the Engineers Board of Contract Appeals was not required to

abide by its promulgated "RULES OF THE CORPS OF CONTRACT APPEALS 33 CODE FEDERAL REGULATIONS 210.4", and specifically as under paragraph "6. Pleadings - (b)" thereof.

3. Whether the Court of Claims had denied petitioners "procedural due process" by arbitrarily and wrongfully concluding that petitioners had waived their right to the Board's promised full-scale hearing as was otherwise appellants' entitlement under paragraph "11. Submission without a hearing" as contained in the "RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS".

4. Whether the Court of Claims had denied petitioners "procedural due process" by arbitrarily and wrongfully concluding that petitioners were not entitled to

the Board's "good faith" administration of paragraph "(e) Preface to Rules" of the "RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS" and specifically as relating to continuances ". . . on good cause shown".

5. Whether the United States Court of Claims wrongfully deprived plaintiffs of "procedural due process" when it sustained the Engineers Board's breach of "ARTICLE 15 - DISPUTES" of appellants' contract which impliedly promised the Government's "Good Faith" adjudication of disputes and as in collateral violation of plaintiffs' rights under the standards of the Wunderlich Act, 41 U.S.C. Sections 321 and 322 pursuant to the Board's adjudication of "ARTICLE 15 - DISPUTES" supra.

6. Whether, as responsive to the provisions of the Wunderlich Act, the Court of Claims' Orders of 6 February and 15 May 1981 as ruling on plaintiffs' restrictive "MOTION FOR SUMMARY JUDGMENT ETC." (as in accord with the Court's prior direction), involved only the Corps of Engineers Board of Contract Appeals' Decisions of 16 August 1978, and thereby had only dispositive subject matter jurisdiction of the said administrative claims. The latter as differentiated from plaintiffs' bifurcated "breach of contract claims" which had not been heard nor adjudicated by the Court of Claims (1. supra).

7. Whether the Court of Claims made a partially void judgment when by its Orders of 6 February and 15 May 1981, it

mistakenly, erroneously, inadvertently and by excusable neglect dismissed plaintiffs' petition dated 5 July 1972 in toto without having adjudicated plaintiffs' bifurcated "breach of contract claims" (1. supra).

8. Whether, following the filing of plaintiffs' "MOTION FOR THE VACATING ETC." of the Court of Claims' prior erroneous ORDERS of 6 February and 15 May 1981 (and despite plaintiffs not having been officially informed by the Court of its unilateral mistake, inadvertence, surprise, excusable neglect, and partially void judgment until 24 September 1981), the Court was nonetheless justified in dismissing plaintiffs' action under its "RULE 152. RELIEF FROM JUDGMENT OR ORDER". The latter dismissal despite the

totality of the foregoing, and as allegedly responsive to Rule 152 (b)(1), and specifically (4) the judgment is partially void (see 7 supra) or additively as under (6) any other reason justifying relief from the operation of the judgment (the Court's defective judgment).

9. Whether the Court of Claims, having been informed in plaintiffs' "Briefs" in support of their "MOTION FOR SUMMARY JUDGMENT" and their "MOTION FOR REHEARING OF THE COURT'S ORDER OF FEBRUARY 6, 1981" that plaintiffs' motion was in effect for partial summary judgment, and similarly as set out in plaintiffs' "MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981", under the totality of the

involved circumstances should have in equity vacated its ORDERS[1] of February 6, 1981 and May 15, 1981, sua sponte, that is, prior to September 24, 1981, as soon as the Court first had knowledge of its partially void "ORDERS", POINT IV, pages 58 to 63.

1/ PETITIONERS PERTINENTLY POINT OUT THAT THERE WAS NO DECISION BY THE COURT OF CLAIMS UPON PLAINTIFFS' "BREACH OF CONTRACT CLAIMS", AND FURTHER, THAT NO DECISION THEREON WAS NECESSARY TO "REVIEW THE ENGINEERS BOARD OF CONTRACT APPEALS INVOLVING DENIAL OF PROCEDURAL DUE PROCESS". HENCE THE COURT'S DISMISSAL OF THE PLAINTIFFS' PETITION "IN TOTO" WAS SURPLUSAGE AND IN ERROR AND PLAINTIFFS ARE NOT BOUND THEREBY. SCHOFIELD V. RIDEOUT, 233 WIS. 550, 290 N.W. 155 (1940)

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OPINIONS BELOW

The original Court of Claims' ORDER, dated 6 February 1981 dismissing plaintiffs' "Complaint" is designated A, page 1a, of the Appendix; and the Court of Claims' ORDER, dated 15 May 1981 denying plaintiffs' "Motion for Rehearing" is designated B, page 21a of the Appendix; and the Court of Claims' ORDER, dated 16 July 1982 denying plaintiffs' "Motion for the Court's Order Vacating Etc. Its Judgments of February 6, 1981 and May 15, 1981" is designated C, page 22a of the Appendix; and finally the Court of Claims' ORDER dated 10 September 1982 denying plaintiffs' "Motion for Rehearing of Court's Order of July 16, 1982" is designated D, page 27a of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of "Title 28, United States Code 1255". The Supreme Court of the United States, by ORDER dated 1 December 1982, extended petitioners' filing date for "PETITION FOR WRIT OF CERTIORARI" to and including 7 February 1983.

STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENTS

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

THE WUNDERLICH ACT

(68 Stat. 81, 41 U.S.C.)

Section 321. Limitation on pleading contract-provisions relating to finality; standards of review.

No provision on any contract entered into by the United States, relating to the finality or conclusiveness of any decision on the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: Provided, however, That any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.

Section 322. Contract-provisions making decisions final on questions of law.

No Government contract shall contain a provision making final on a question of law the decision on any administrative official, representative, or board.

APPLICABLE RULES OF THE CORPS OF ENGINEERS BOARD OF CONTRACT APPEALS 33 CODE OF FEDERAL REGULATIONS 210.4

Preface to Rules

(b) For this reference, see page xvii.

(c) Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

(d) Preliminary procedures are available to encourage full disclosure of relevant and material facts, and to discourage unwarranted surprise. The parties are expected to cooperate and to voluntarily comply with the intent of such procedures without resort to the Board except on controversial questions. The Board may order exchange of complicated exhibits prior to hearing in order to expedite the hearing.

(e) All time limitations specified for various procedural actions are computed as maximums, and are not to be fully exhausted if the action described can be accomplished in a lesser period. These time limitations are similarly eligible for extension in appropriate circumstances, on good cause shown.

6. Pleadings.

(a) Within 30 days after receipt of notice of docketing of the appeal, as provided in the last sentence of Rule 3, the appellant shall file with the Board an original and two copies of a complaint setting forth simple, concise and direct statements of each of his claims, alleging the basis with appropriate reference to contract provisions for each claim, and the dollar amount claimed. This pleading shall fulfill the generally recognized requirements of a complaint, although no particular form or formality is required. Upon receipt thereof, the Recorder of the Board shall serve a copy upon the respondent. Should the complaint not be received within 30 days, appellant's claim and appeal may, if in the opinion of the Board the issues before the Board are sufficiently defined, be deemed to set forth his complaint and the respondent shall be so notified.

(b) Within 30 days from receipt of said complaint, or the aforesaid notice from the Recorder of the Board, respondent shall prepare and file with the Board an original and two copies of an answer thereto, setting forth simple, concise and direct statements of respondent's defenses to each claim asserted by appellant. This pleading shall fulfill the generally recognized requirements of an answer, and shall set forth any affirmative defenses or counterclaims, as

appropriate. Upon receipt thereof, the Recorded shall serve a copy upon appellant. Should the answer not be received within 30 days, the Board may, in its discretion, enter a general denial on behalf of the Government, and the appellant shall be so notified.

8. Hearing - election.

(a) Upon receipt of respondent's answer or the notice referred to in the last sentence of Rule 6(b), appellant shall advise the Board whether he desires a hearing, as prescribed in Rules 17 through 25, or whether in the alternative he elects to submit his case on the record without a hearing, as prescribed in Rule 11.

(b) In appropriate cases, the appellant shall also elect whether he desires the optional accelerated procedure prescribed in Rule 12.

11. Submission without a hearing.

Although both parties are entitled to a hearing under these rules, either party may elect to waive a hearing and to submit his case upon the Board record as settled pursuant to Rule 13. Such an election by one party shall not preclude the other party from requesting and obtaining a hearing. Affidavits, deposi-

tions, answers to interrogatories and stipulations may be employed to supplement other documentary evidence in the Board record. The Board may permit such submission to be supplemented by oral arguments, transcribed if requested, and by briefs arranged in accordance with Rule 23.

17. Hearings - Where and when held.

Hearings will ordinarily be held in Washington, D. C., except that, upon request seasonably made and upon good cause shown, the Board may in its discretion set the hearing at another location. Hearings will be scheduled at the discretion of the Board with due consideration to the regular order of appeals and other pertinent factors. On request or motion by either party and upon good cause shown, the Board may in its discretion advance a hearing.

18. Notice of hearings.

The parties shall be given at least 15 days notice of the time and place set for hearings. In scheduling hearings, the Board will give due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay. Notices of hearings shall be promptly acknowledged by the parties.

19. Unexcused absence of a party.

The unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

29. Motions for Reconsideration.

A motion for reconsideration, if filed by either party, shall set forth specifically the ground or grounds relied upon to sustain the motion, and shall be filed within 30 days from the date of the receipt of a copy of the decision of the Board by the party filing the motion.

N.B. The following paragraph should have appeared at the top of page xvii supra.

(b) When an appeal is taken pursuant to a disputes clause in a contract which limits appeals to disputes concerning questions of fact, the Board may in its discretion hear, consider and decide all questions of law necessary for the complete adjudication of the issue. In the consideration of an appeal, should it appear that a claim is involved which is not cognizable under the terms of the contract, the Board may make findings of fact with respect to such a claim without expressing an opinion on the question of liability.

ARTICLE 15. DISPUTES.

Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative whose decision shall be final and conclusive upon the parties hereto. in the meantime the contractor shall diligently proceed with the work as directed.

The foregoing is excerpted from Contract No. DA-49-080-Eng-27 Dated 7 September 1949, for six additional filters at the Dalecarlia Filtration Plant, Washington Aqueduct, Washington, D. C. Also see "THE WUNDERLICH ACT" (xii supra).

STATEMENT OF THE CASE

At the outset, this court's attention is respectfully invited to the fact that petitioners are initially challenging herein the Engineers Board of Contract Appeals' involved procedures and decisions upon constitutional grounds; namely: the Board's denial of "procedural due process" to appellants. Pertinently, the courts have stated that the solution of such challenges is unsuited to administrative hearing procedures, and accordingly access to the courts is essential to the decision of such questions, Johnson v. Robinson, 415 U.S. 361, 366-367; and derivatively plaintiffs are challenging the erroneous legal decisions of the Court of Claims devolving from plaintiffs' "Motion for Summary Judgment" pursuant to its

Rule 163. Dispositive Motions (b)(2), and Rule 152. Relief from Judgment or Order.

The pertinent administrative record before the Engineers Board as commencing with 18 March 1978 shows that appellants timely filed twelve amended complaints in accord with the Board's "Rule 6. Pleadings" (79a). The twelve amended complaints incorporated appellants' newly discovered evidence, which had been obtained from respondent's records, under a prior Court of Claims' order. Appellants' filing of their twelve amended complaints was completed on 4 April 1978 (79a)[1]. Subsequently the respondent (herein referred to as government) failed to respond to any of appellants' twelve amended complaints within the thirty day

1/ All references shown as (79a etc.) refer to pages of petitioners' "Appendix" and as identified on its TABLE OF CONTENT.

period as required by the Board's pertinent Rule 6(b) and "Preface to Rules, paragraphs (c),(d) and (e)".

Pursuantly, appellants on 20 June 1978 (79a), more than 75 days after the filing of their complaints supra, wrote the Engineers Board and specifically complained of the government's violation of the Board's "Rule 6. Pleadings. (b)" and relevant parts of the Board's "Preface to Rules, paragraphs (b),(c),(d) and (e)". On 22 June 1978, the Engineers Board responded by letter addressed to the government's several trial attorneys and informing them that they should answer appellants' complaints within 30 days. It is to be noted that to the date of 22 June 1978, the Board had also collaterally violated its Rule 6(b) which re-

quired the Board to act within 30 days of appellants' filing of their complaints and additively as reflecting paragraphs (c),(d) and (e) of its "Preface" to its Rules supra. Ultimately the government's twelve answers to appellants' complaints were received eight months after the filing of appellants' complaints; that is, on 27 November 1978, one week before the 5 December 1978 hearing date.

Following the receipt of a copy of the Board's letter (83a) supra, the appellants in their intensive efforts to receive the government's required essential answers to their twelve complaints supra, so as to timely prepare for the scheduled 5 December 1978 hearing, diligently sought to secure the Board's cooperative assistance in their endeavors.

Such cooperative assistance was never supplied.

As evidencing appellants' efforts to have the Board require the government to answer their complaints, petitioners list the following documents as progressively developed in connection with appellants' attempts to secure "procedural due process". These referenced documents were included, by identified page numbers, in plaintiffs' "Appendix", as was filed in the Court of Claims in support of "Plaintiffs' Appeal from Engineers Board of Contract Appeals Decisions, Rulings and Orders Promulgated August 28, 1979"; namely:

1. Appellants' Motion and Supporting Brief dated July 13, 1978 (11 pages-29a)

2. Appellants' Letter to Board dated 21 July 1978 (3 pages-43a).

3. Appellants' Letter to Board dated September 22, 1978 (2 pages-50a)

4. Appellants' Letter to Government Trial Attorney dated September 22, 1978 (2 pages-53a)

5. Appellants' Letter to Government Trial Attorney dated September 25, 1978 (5 pages-56a)

6. Appellants' Letter to Board dated 7 October 1978 (5 pages-61a)

N.B. The numbers shown next above are not to be confused with those shown herein in petitioners' "Appendix".

Next, as the scheduled hearing date of 5 December 1978 approached, appellants intensified their efforts to secure the government's answers to appellants' twelve complaints as responsive to the Board's Rule "6. Pleadings. (b)" so as to

insure receiving essential "procedural due process". Appellants' further successive efforts are set out in corroborative detail in the "Table of Content" of petitioners' "Appendix", and include:

7. Appellants' "Motion for Postponement Etc.", 8 November 1978 (31a)

8. Appellants' "Brief in Support of Motion" supra, 10 November 1978 (32a)

9. Appellants' "Supplementary Brief in Support of Motion", 14 November 1978 (37a)

10. Board's "Order", 15 November 1978 (42a)

11. Renewal of Appellants' "Motion of November 8, 1978", 18 November 1978 (44a)

12. Appellants' "Motion to Stay Etc." 22 November 1978 (50a)

Pursuant to the foregoing: on 27 November 1978 appellants received the government's twelve (12) answers en masse as in ostensible response to appellants' complaints, but as then in patent violation of the Board's "Rule 6. Pleadings. (b)" supra, as well as in affirmative violation of the Board's correlative "Preface to Rules. (c),(d) and (e)" supra. It is clear that the appellants had been frustrated in their endeavors to be timely apprised of the government's answers and not as otherwise apprised on the eve of the scheduled hearing date.

Because of its essentiality to the proper presentation of appellants' claims before the Engineers Board, appellants reiterated their prior urgent requests for a continuance of the 5 Decem-

ber 1978 hearing date, specifically as shown by:

13. Appellants' Western Union Letter, 3 December 1978 (56a)

Appellants, in their papers, items 1 to 13, pages 5,6,7,and 9 supra, had repeatedly informed the Board that the failure of the government's trial attorneys to timely comply with the established essential procedural pleading requirements, and their added last-minute pyramiding of twelve motions for dismissal etc. necessitated appellants requesting the Board for a continuance of the 5 December 1978 hearing date. However, the Board had persistently refrained from acting upon appellants' prior motions and requests, but nonetheless had a concomitant awareness that it intended to deny appellants'

requests, and thereby to collaterally introduce a serious handicap to appellants' effective presentation of their claims. Appellants submit that such procedure, as predicated on the record, had been planned by the Board and was finally effectively implemented by the Board's Order (53a). The latter was transmitted under date of 30 November 1978 and received by appellants on 4 December 1978.

Pursuantly, the first paragraph of the Board's Order stated:

> "The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in Eng. BCA 2678 unless the 5 December 1978 hearing is postponed."

Thus a qualified possibility of an open-ended postponement was expressed; however, in its final paragraph, the Board's expressed potentiality became non-existent:

> "The unexcused absence of a party at the pre-hearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11."

In appellants' opinion, the foregoing vacillating "order" represented a clear attempt at coercion by the Board and was intended not only to deprive appellants of a necessary continuance indispensable under the circumstances but also intended to pave the way for the Board and the government's trial attorney to collectively attempt to proceed to adjudicate the disputes upon a defective administrative record; and for the government to thereby not to have to meet the collateral allegations of fraud as contained in a number of appellants'

twelve complaints. For the Engineers Board to hold a substitute "ex parte" hearing as "on the record" in lieu of the otherwise expressly promised "full-scale" hearing (28a), constituted an obvious instance of "a broken promise" by the Board. That is the opposite of the promise of a "full-scale hearing" and one upon which the appellants had fully relied. This development as was progressively programmed was an obvious instance of the Board's "bad faith" administration of "ARTICLE 15: DISPUTES" of the contract. Clearly it was on its face not a "good faith procedural due process" adjudication and such as is guaranteed by the United States Constitution. Estoppel was thus involved supra.

As in response to the developments next above, appellants necessarily dis-

patched the following protesting communications to the Board as intended with abundant "good cause" to resist the Board's coercive efforts to deprive appellants of "procedural due process" and to collaterally urge the Board's favorable remedial action.

14. Appellants' Letter of Confirmation of Western Union Telegram of 4 December 1978 Re: Board's Hearing scheduled for 5 December 1978 dated 4 December 1978 (58a)

15. Appellants' Letter of Confirmation of Western Union Telegram of 5 December 1978 Re: Board's Hearing Scheduled for 5 December 1978 dated 5 December 1978 (60a)

16. Appellants' Mailgram Re: Protest of Lack of "Due Process" dated 6 December 1978 (62a)

17. Appellants' Mailgram to Trial Judge, Court of Claims, dated 17 December 1978 (64a)

Despite the totality of the foregoing, the Engineers Board adamantly, arbitrarily, capriciously and erroneously, and in abuse of its discretion under the circumstances, rejected all of appellants' importunities and continued to preemptorially deny appellants' requests out-of-hand.

The foregoing represents the initial aspects pertinent to the Board's denial of "lack of procedural due process" clearly in violation of the Board's pertinent Rules, "Preface paragraphs (c),(d) and (e)" and "Rule 6. Pleadings. (b)", and the foregoing affirmative violations are to be contrasted with another comparable situa-

tion as is squarely on all-fours, and as involving a coordinate Administrative Board's Decision; namely: United States v. J. Hubert Smith, as is recorded in "Decisions of the Department of the Interior", 311 (67 I.D.), Decided 1 August 1960 (86a). Appellants submit that it is clear the Board knew or should have known that its contentions were wrongful and that in knowingly depriving appellants of their rights at law, the Board perpetrated a wrong not only against the appellants but also against the Court of Claims.

As predicated upon the Board's actions supra, it is to be observed that the Board sanctioned and condoned the government's last-minute wrongful filing of its twelve answers to plaintiffs' twelve complaints and thereby making it impossible

for plaintiffs to timely analyze and reflect the content of the government's answers in appellants' effective presentation of their case before the Board.

Immediately prior to, and subsequent to, the Board's Order of 30 November 1978(53a), as received by appellants 4 December 1978, as on the eve of the hearing date, appellants again protested and timely informed the Board that they were unwilling, under the attendant circumstances, to prejudice their vested rights to the constitutionally guaranteed "procedural due process" and collaterally informed the Board that they were thus unable to participate in the Board's otherwise intended unilateral (ex parte) hearing. Nevertheless, on 5 December 1978 the Board, over appellants' repetitive,

timely objections and as in abuse of its administrative discretion, and as arbitrarily and capriciously reneging on its promise to hold a "full-scale hearing" (28a), commenced its "ex parte-some kind of hearing" and which of a certainty could but deprive appellants of their constitutional right to "procedural due process".

Apropos of the foregoing, it is to be noted that appellants (by Item 14., (58a), page 13 supra) specifically informed the Board:

> "Also we do not waive a hearing, nor agree to submitting our case on the record."

The latter statement clearly and timely informed the Board of appellants' contentions as to their contemplated action to prevent the deprivation of their right to

"procedural due process" and as contemplative of a "full-scale hearing".

Pursuantly, the record shows as by Items 1 to 15 as identified supra, that appellants had timely and strenuously protested the procedural deficiencies condoned by the Board as being violative of its own basic pleading procedures, and that such specified deficiencies were depriving plaintiff, at the very threshold to the hearing-room of the protection of the Board's rules (xiii supra), a part of its governing regulations as specifically involving basic pleading procedures. The foregoing "Rules" are essential to, and intended for, the protection of both the appellants' and the respondent's contractual and constitutional right to "procedural due process". Hence, from the

factual totality of the foregoing, appellants assert they were wrongfully denied a "full-scale" evidentiary hearing as a consequence of the Board's arbitrary, capricious and erroneous contention that appellants had, contrary to fact (p. 17 supra), waived their right to a full-scale evidentiary hearing. The constitutional right to a full-scale hearing is elemental as necessarily providing "procedural due process". The foregoing was concluded by the Supreme Court in Morgan v. United States, 298 U.S. 468 (1936) and in 304 U.S. 1 (1937) wherein Mr. Chief Justice Hughes so succinctly stated:

> "The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall

be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion, uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."

CONTINUED STATEMENT OF THE CASE AS SPECIFICALLY RELATES TO THE COURT OF CLAIMS' SUBSEQUENT PARTICIPATION IN THE MATTER OF ADJUDICATING PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979

On 7 December 1973, the Court of Claims' Trial Judge, to whom the action had been assigned, issued "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS". The Court's order was intended to facilitate the processing of certain claims contained in plaintiffs' petition to the Court of Claims

by the Engineers Board. That is, for the possible processing by the Board ". . . for Expedited Discovery, Inspection, Hearing, Rehearing and Reconsideration." Said claims were thus channeled to the Engineers Board for its potential administrative consideration and adjudication and said claims were totally independent, separate and distinct from certain other "breach of contract claims" as were so designated and collaterally included in plaintiffs' "Petition" which had been filed in the United States Court of Claims on July 5, 1972.

Seven years later, on August 28, 1979 the Engineers Board issued its Decision on its "ex parte" hearings of the certain claims as had been remanded supra for potential processing. On November 16, 1979,

the Trial Judge (66a) informed plaintiffs in response to their query as to the next procedural step to be taken concerning the claims which had been previously forwarded the Engineers Board for administrative action that the next procedure for plaintiffs was to ". . . file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals". The foregoing query and response related only to the claims which had been in fact remanded on 7 December 1973 supra. Clearly as by the Court of Claims' specific advices, such potential motion was to be restricted to the specific claims remanded and was not to include the bifurcated "breach of contract claims" which had not been therebefore considered or adjudicated in any

sense by the Court of Claims. That is, plaintiffs' "breach of contract claims" had received no adjudicative processing by the Court during the entire period that the Court, as a result of its stay, was also awaiting the Board's decisions in the "remanded claims". Pursuant and responsive to the Trial Court's advices supra, plaintiffs duly filed their motion for summary judgment and such motion was properly restricted to their single threshold contention that they had been denied "procedural due process" prior to the scheduled December 5, 1978 hearing. Thereafter, and as solely dependent on the outcome of the Court's decision on plaintiffs' restricted "MOTION FOR SUMMARY JUDGMENT", it was anticipated the parties would then be duly informed if

the Court might possibly adjudicate "de novo" the remanded claims which had been decided "ex parte" by the Board, and also be advised when the Court's adjudication of plaintiffs' "breach of contract claims" would commence. The latter as had been stayed on December 7, 1973 by the Court of Claims' Trial Judge (page 20 supra).

It is necessary for continuity to add at this point that plaintiffs have stated that until 26 September 1981, plaintiffs were of the belief that the only claims which had been in fact dismissed by the Court on February 6, 1981 (1a) were those restrictively included by the Trial Judge's instruction in plaintiffs' "MOTION . . ." supra. However, as of 24 September 1981, plaintiffs were officially informed by the Clerk of the Court

of Claims (74a) that the Court had dismissed not only plaintiffs' claims which had been restrictively included in their "Motion For Summary Judgment", but correlatively their entire "Petition" filed 5 July 1972 and which included their bifurcated "breach of contract claims". The Clerk's letter was responsive to plaintiffs' letter of September 19, 1981 (67a) as addressed to the Court of Claims' Trial Judge.

As premised upon the content of the preceding three paragraphs, the following recital represents the chronological, procedural developments in the Court of Claims subsequent to the Board of Contract Appeals issuing on August 28, 1979 its administrative decisions as only involved a part of plaintiffs' bifurcated claims in-

cluded in their petition filed July 5, 1972 in the Court of Claims; namely:

By letter dated 16 November 1979 (66a), the Court of Claims' Trial Judge, having full knowledge of all prior developments in the case, informed plaintiffs as follows:

"Gentlemen:

> As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly."

Plaintiffs thereafter responsively filed their motion, comprehensive brief and appendix entitled:"PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS, AND ORDERS PROMULGATED AUGUST 28, 1979".

ON FEBRUARY 6, 1981 THE COURT OF CLAIMS ISSUED ITS ORDER (A-1a) AND WHICH WAS CONCLUDED BY THE WORDS: "THE PETITION IS DISMISSED".

N.B. Informatively it is stated that Plaintiffs were not accorded a hearing on their motion etc.

Plaintiffs timely appealed the Court's Order of February 6, 1981 by motion, comprehensive brief and appendix entitled: "PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR REHEARING OF COURT'S DECISION OF FEBRUARY 6, 1981".

On May 15, 1981, the Court, without granting plaintiffs oral argument, issued its Order concluding with the words: "IT IS ORDERED THAT PLAINTIFFS' SAID MOTION FOR REHEARING IS DENIED" (B-21a)

As pointed out above, pages 24 and 25,

plaintiffs were officially advised by the Clerk of the Court of Claims that their entire petition filed July 5, 1972, and as included their "breach of contract claims" had been dismissed "in toto".

Plaintiffs, in their endeavor to remedy the situation, and in great detail, compiled an appendix to show that their petition contained "breach of contract claims" and should not have been dismissed "in toto". The foregoing in the belief that if the Court did not have the extreme in "convincing evidence before it", to show that the Court's "dismissal" of February 6, 1981 was grossly in error, there would be but another cursory denial.

Accordingly, plaintiffs duly filed their motion, comprehensive brief and

appendix entitled:

"PLAINTIFFS' MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981"

On July 16, 1982, the Court of Claims without oral argument issued its order concluding with the words: "Plaintiffs' motion under Rule 152(b) is denied." (C-22a)

Plaintiffs subsequently filed their motion for reconsideration of the Court of Claims' Denial supra inasmuch as the Court's decision had been issued prior to plaintiffs' filing of their reply to defendant's opposition to plaintiffs' motion next above. Accordingly, plaintiffs filed their reply memorandum entitled:

"PLAINTIFFS' REPLY MEMORANDUM TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION UNDER RULE 152 TO VACATE THE COURT'S ORDERS OF FEBRUARY 6, 1981 AND MAY 15, 1981"

On September 10, 1982, the Court

denied rehearing, reconsideration or other relief (D-27a).

Subsequently petitioners once again turned to this Court for relief from what is in their opinion a denial of their constitutional right to "procedural due process" by the Engineers Board of Contract Appeals, and for relief in turn from what is in their opinion a series of erroneous orders (judgments) by the Court of Claims; and wherefore the said matters are being advanced by PETITION FOR WRIT OF CERTIORARI.

ARGUMENT

POINT I.

THE ENGINEERS BOARD DENIED APPELLANTS "PROCEDURAL DUE PROCESS" AS REQUIRED BY ITS REGULATIONS

The record shows that appellants duly filed their twelve separate complaints as covering separate claims in accord with the Board's "Rule 6. Pleadings. (a) and (b)" and (e) of the "Preface to Rules" (xiii), and which rules correlatively required the government to answer appellants' complaints within 30 days thereafter, xiv supra. On June 20, 1978 (79a), approximately 90 days (on average) after plaintiffs' complaints had been served, plaintiffs complained to the Board that the government's necessary answers had not been received. On June 22, 1978 (83a) the Board informed the government's attorney

that the answers should be filed within 30 days thereafter. It is to be noted that the Board itself was negligent in not fulfilling its duty under Rule 6(b), and (e) of the "Preface" provisions, and which required the Board to monitor the required pleading developments so as to provide substantial and impartial justice to the parties.

Pertinently: the record shows, pages 2 to 10 supra, that appellants had faithfully endeavored to secure the government's answers to the end that they might effectively adapt appellants' presentation of their case, to the admissions, denials or affirmative defenses or counterclaims of the government's answers, and in toto "This pleading (answer) shall fulfill the generally recognized requirements of an

answer", Rule 6(b) (xiii supra).

The Supreme Court is respectfully requested to scrutinize the pertinent detailed record as has been set out upon pages 5 to 8 supra, and to note that the government's twelve answers were in fact not received by the appellants until November 27, 1978, which was on average eight (8) months after they had been served. Said delay ensued despite appellants' most strenuous efforts to obtain the government's answers. After the expiration of six months, and the answers had not been received (See pages 5 and 6 supra), appellants invoked Rules (c),(d) and (e), pages xiii and xviii supra, for relief, and which was not forthcoming; and in view of the continued non-receipt of the government's answers, appellants

requested a continuance of the 5 December 1978 hearing date under the Board's Rules, "Preface to Rules, (c) and (d)" (See 33a, 37a, 43a, 44a, 53a, 56a, 58a, 60a, 62a, and 64a. Factually, the government's answers were due not later than May 10, 1978; they were not received until November 27, 1978.

The totality of the foregoing evidences that all of appellants' efforts to timely secure the government's answers were futile despite appellants' full compliance with the Board's Rules.

Pertinently: the Court's attention is invited to an Interior Board of Contract Appeals' decision (86a) as involves a pleading answer on all fours with the subject situation; namely: United States v. J. Hubert Smith, A-28387, recorded in "De-

cisions of the Department of the Interior" 311 (67 I.D.), Decided 1 August 1960: Mining Claims: Contests--Rules of Practice: Government Contests--Regulations: Waiver, and including the following quotation therefrom:

> "In a recent decision, Earl D. Deater v. John C. Slagle, A-28121 (May 24, 1960), the Department held that under the rules of practice where an answer to a complaint in a private contest is filed one day late the allegations of the complaint must be taken as admitted by the contestee and the case decided without a hearing, and that the Secretary is without authority to waive the rules to permit the late filing of the answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955); Chapman v. Sheridan-Wyoming Coal Company, 338 U.S. 621 (1950)"

Appellants submit that the underlined portion above is applicable herein, and that appellants' allegations as set out in

their complaints should have been taken as admitted by the government and the case decided without a hearing. The Engineers Board was without authority to disregard its own regulations; namely: "Rule 6. Pleadings (a) and (b)" and "Preface to Rules (c), (d) and (e)".

Pursuantly, the government and appellants had bargained for "good faith" administration as under the applicable provisions of the Wunderlich Act (xii supra). As based on the totality of the foregoing, the Board of Contract Appeals failed to provide that which the government had promised: "good faith" administration. As a consequence of the Board having so wrongfully disregarded its own regulation supra, the appellants were denied "procedural due process" and subsequently

suffered great damages as devolved from the Engineers Board's capricious, arbitrary and grossly erroneous decisions as necessarily imply "bad faith" supra.

POINT II

PETITIONERS ASSERT THEY MADE NO LEGAL WAIVER OF APPELLANTS' CONTRACTUAL AND CONSTITUTIONAL RIGHT TO A "FULL-SCALE HEARING" OF THEIR TWELVE SUBJECT CLAIMS AGGREGATING $190,000.00 AS BEFORE THE ENGINEERS BOARD OF CONTRACT APPEALS, NOR MADE LEGAL ELECTION TO SUBMIT THEIR CLAIMS ON THE RECORD UNDER BOARD RULE 11

Petitioners have asserted and evidenced under POINT I that they had not received "procedural due process" in that the Board repeatedly violated its regulations: "Rule 6. Pleadings. (a),(b)" and (c),(d) and (e) of its "Preface to Rules". Appellants informed the Board after their repeated protests and notices had been ignored they were unwilling to commence a

less than meaningful "full-scale hearing" and as clearly set out in appellants' letter of 3 December 1978 (57a), telegram of 4 December 1978 (59a), telegram of 5 December 1978 (60a), and mailgram of 6 December 1978 (62a). Said situation had progressed toward an impasse as a consequence of the government's attorney not supplying answers to the twelve separate claims (aggregating $190,000.00, exclusive of "breach of contract claims" then pending before the Court of Claims) until 27 November 1978. The latter as seven days before the 5 December 1978 hearing date and condoned by the Board.

Upon 5 December 1978 the Board commenced an "ex parte" hearing allegedly in accordance with its Rule 11 and stating that its authority for doing so was that

appellants had waived their right to a "full-scale hearing" by their non-appearance. Appellants had therebefore advised the Board that they would not jeopardize their vested contract rights to the timely receipt of the government's answers; and absent which answers they would be crippingly handicapped in the factual and legal presentation of their case. Had they proceeded without such insistence, the same Board would subsequently have asserted that appellants had voluntarily proceded with the hearing. Correlative to the Board's prior statement that appellants had waived their right to a "full-scale hearing", it supplemented such statement (on page 2, paragraph 2 of its decision dated 28 August 1979) by concluding:

"We conclude that appellants' failure

> to appear on 5 December 1978 was in legal effect an election to submit on the record."

Pertinently: can this Court believe such assertion in the face of the record that appellants elected to submit on the record? After having itself blatantly violated its pleading rules, it joined in making it possible for the government to likewise violate its rules. More accurately, should it not be said: "The Board and the government's attorney in legal effect elected to first wrongfully violate the Board's rules and then to develop such a complex situation as would inevitably thwart appellants' endeavor to secure relief from the Court of Claims?

Petitioners assert that the totality of the involved facts clearly evidences that they did not legally elect supra to

submit their claims on the record and contrariwise they stated they did not waive a hearing (58a) as covering the twelve claims aggregating $190,000.00 before the Board. Petitioners state that the Board held its "ex parte" hearing under its Rule 11 (55a). Reference to Board's Rule 11 (xv supra) will show that said "Rule 11. Submission without a hearing" places the election ". . . to waive a hearing and to submit a case upon the Board record. . ." solely in either party's control but not in the Board's control. The record shows that the appellants requested and desired a "full-scale hearing" and not an imitation thereof as the Board was intent on ultimately supplying. Pertinently see Camel Mfg. Co. v. The United States, 214 Ct Cls 470, wherein the Court

at p. 486 stated:

> "As plaintiff notes, the cited section constitutes only a ruling and this is not due the same deference as a properly issued regulation" (Rule 11).

The regulation in the subject circumstances precluded resort to Rule 11, page 35 supra.

Pursuantly it is to be noted that the Board wrongfully sought to channel the twelve separate claims aggregating $190,000.00 into a channel conventionally reserved for small claims of $1000.00 to $2000.00. Apropos thereto, the Court is requested to scrutinize the decision (84a to 86a) Re: Appeal of Morgan Construction Company, (67 I.D.) IBCA-253, Decided September 20, 1960:

> "Contracts: Appeals: Contractor-appellant has a contractual right to 'be afforded an opportunity to be heard and to offer evidence in support of its appeal.' This right must be honored even if amount of claim in-

> volved is small. Parties may stipulate to submit appeal 'on the record.'" (Underlining supplied)

Therein the Board, in lieu of a hearing on the record as urged by the government, because of the small amount of the claim, stated:

> "This course of action seems to be desirable, indeed. However, the Board has no power to compel the appellant to follow this course of action as it has a contractual right to a hearing, regardless of the amount of the claim involved. Hence, the Board denies the motion in so far as it concerns further procedures concerning Claims Nos. 1 and 3."

Finally, and again referring to the Board's statement that appellants waived their right to a "full-scale hearing", petitioners submit that contrariwise there was no waiver, for as in accord with established principles of law: a waiver constitutes the intentional relinquishment of

a known right, and even as including the intentional waiver of a constitutional "due process" right. However, it is and must remain, a voluntary act. A waiver implies or expresses an election by a party to dispense with something of value which he might at his option have demanded, 56 Am Jur 102. Petitioners assert that the Board's conclusion supra that appellants had elected to waive their contract right to a "full-scale hearing" is in error. Such alleged waiver would clearly have to be a voluntary and intentional renunciation, or as otherwise clearly indicated by some affirmative inaction inconsistent with a vested contract right or constitutional right, and such waiver is absent in the instant situation. See Long v. Clark, 135 Pac. Rep 673. The

only inconsistent act herein involved is that of the Board, which arbitrarily and capriciously attempted to insist on doing for appellants that which they expressly refused to do for themselves (58a).

Petitioners assert that the Engineers Board, in totality, as set out above as under the standards of the Wunderlich Act, acted capriciously, arbitrarily, erroneously to such degree that its actions equated to "Bad Faith" administration.

POINT III

THE ENGINEERS BOARD OF CONTRACT APPEALS EXPRESSLY PROMISED APPELLANTS ". . .A FULL-SCALE HEARING. . ."(28a) AND WHICH CONVENTIONALLY SHOULD HAVE EQUATED TO THE CONCEPT OF "PROCEDURAL DUE PROCESS" AS CONTEMPLATED BY JUDGE FRIENDLY'S[1] "SOME KIND OF HEARING" AND PERTINENT ASPECTS OF WHICH ARE HEREINAFTER INCLUDED

1/ Judge, United States Court of Appeals for the Second Circuit, University of Pennsylvania Law Review, Vol. 123, pp. 1267-1317.

Appellants have asserted that the Engineers Board initially denied them "procedural due process" as related to the refusal of the Board to honor its own regulations, POINTS I AND II supra, and also denied appellants "due process" when it denied them a "full-scale hearing". Specifically the Board by letter dated June 26, 1978 (28a), informed the appellants ". . . that a full-scale hearing in connection with the above-captioned appeals has been scheduled to commence. ." (Underlining supplied). Petitioners submit the words "full-scale hearing" are descriptive words of art conveying a well-recognized legal meaning.

Apropos of the foregoing, in Morgan v. United States, 298 U.S. 468 (1936), and in 304 U.S. 1 (1937) it was said:

(298 U.S. 473) "Before reaching these questions we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires. They rightly assert that the granting of that hearing is a prerequisite to the making of a valid order..."

(304 U.S. 1)"(1) The right to a "full hearing" embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one..."

(304 U.S. 8)"The more extensive the employment of the implement of the administrative tribunal becomes-and its use is daily becoming more widespread-and the more credit which is given to its decisions, the more important is it that strict regularity be observed in the conduct of its hearings and that all the elements of a full and fair hearing and of due process of law be accorded.

(304 U.S. 15) "These demand a 'fair and open hearing',-essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73;

Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305.

THE BOARD'S ADMINISTRATIVE JUDGE WAS DUTY BOUND NOT TO DEPRIVE APPELLANTS OF THEIR "DAY IN COURT"

In the citations next above, the court emphasized that a decision based on evidence is the indispensable requisite of "due process". Clearly then, when the Board, over appellants' repetitive objections, otherwise proceeded to conduct a prejudicial "ex parte hearing" it affirmatively precluded appellants from introducing their own evidence, and correlatively denied appellants their procedural right to utilize all other collateral customary elements of ". . . a full-scale hearing. . .". Such Board denials clearly constituted denials of "due process"; see Donnelly Garment Co. v. National Labor Board, 123 F.2d 215 (CCA, 8th 1941), and

appellants were thereby deprived of an opportunity to be heard "...at a meaningful time and in a meaningful manner.", Armstrong v. Manzo, 380 U.S. 545, 552, and thus to have their "day in court". Such meaningful time and meaningful manner were denied appellants and as basically stemming from not having timely obtained the government's answers (33a, 37a, 43a, 44a, 53a, 56a, 58a, 60a, 62a and 64a).

Pursuant to the foregoing: it is elementary that an administrative adjudication conforming to "due process" must bottom upon evidence specifically introduced by the parties, and as so appearing in the record, and a hearing on the record must be governed by conventional trial procedures. Absent such procedures, it was not possible for the Court to review the facts and applicable law, and then

fairly decide, if as in the subject situation, the ostensible findings of the Board are supported by evidence properly introduced by the parties. But the appellants as a fact were not permitted to introduce their evidence etc. and such to their great detriment. See Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio, 301 U.S. 292 (1937). Furthermore, applicable law is to the effect that:

> "Nothing can be treated as evidence which is not introduced as such." United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 288 (1924).

THE RECORD SHOWS THE BOARD DEPRIVED APPELLANTS OF THEIR EXPRESSLY PROMISED " . . A FULL-SCALE HEARING. . ."

The Board, in depriving appellants of ". . .a full-scale hearing. . .", one wherein appellants could minimally pro-

perly introduce their own evidence etc., did at the threshold deprive appellants of fundamental "procedural due process". Clearly the Board's involved Administrative Judge should have taken all reasonable precautions to have so discharged his duties to avoid such situation occurring. It is a settled legal principle that the essence of the legal process, and particularly where the process is administratively adjudicatory, requires a fair trial; by an unbiased trier of the facts; who must act in good faith; and fairly listens to both sides. For such is the duty lying upon everyone who decides anything and particularly an Administrative Judge. Such Administrative Judge must always give a fair opportunity, in a meaningful manner, to those who are par-

ties in the controversy, for introducing, correcting or contradicting any relevant evidence etc. prejudicial to their view. And further, a trier of facts must particularly avoid arbitrary or capricious acts, or an abuse of discretion: otherwise "due process" is not accorded a litigant. Such essential impartiality etc. was absent in the several rulings and actions of the Board's Administrative Judge as was delagated to preside at the Board's promised ". . .full-scale hearing. . .".

Petitioners further assert as pertinent to the concept of a "full-scale hearing" as pertaining to the matter of "due process" and a "fair trial" that Mr. Justice Lamar, speaking for the Supreme Court in ICC v. Louisville & Nashville R.R., 229 U.S. 88 (1913), said that such full hear-

ing:

> ". . .conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. . .All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer explanation or rebuttal." (at 91, 93).

In other landmark cases the courts have repeatedly upheld similar basic principles; for examples:

(a) Southern Garments Mfrs. Ass'n. v. Fleming, 122 F.2d 622 (D.C. Cir. 1941):
"While the one who decides must hear, it must be remembered that 'hear' is used in the artistic sense of requiring certain procedural minima to insure an informed judgment by the one who has the responsibility of making the final decision and order." 122 F.2d at 626.

(b) In re Murchison, 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942 (1955):

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." 349 U.S. at 136.

(c) Swift & Co. v. United States, 398 F.2d at 851 (7th Cir. 1962): "Due process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair plan and applicable procedural standards established by law." 398 F.2d at 851.

POINT V.

THE COURT OF CLAIMS NEGLIGENTLY AND ERRONEOUSLY DISMISSED "PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS' DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979"

Petitioners submit, as a matter of law, and as premised upon the facts etc. set out in the "STATEMENT OF THE CASE", and likewise as contained in "ARGUMENT-

POINT I., that the Court of Claims had erroneously failed to determine that the Engineers Board of Contract Appeals had in fact breached, and had likewise permitted the government's attorney to breach, the Board's regulations as pertained to "Rule 6. Pleadings. (a)(b)", and breached the Board's "Preface to Rules (c)(d) and (e)", and breached the Board's "Rule 11. Submission without a hearing." (xiii to xvii supra) And in addition:

The Court of Claims had erroneously failed to ascertain and determine that the Engineers Board had capriciously, arbitrarily and erroneously breached its own regulations, pp. 35 and 36 supra, and more pointedly as on pp. 49 and 50 supra. Likewise the Court of Claims had failed to observe and reflect the fact that the peti-

tioners had not waived their contractual and constitutional rights to the promised "full-scale hearing" of petitioners' twelve administrative claims in the aggregate sum of $190,000.00. The latter as had been remanded to the Board by the Court of Claims' "ORDER" of 7 December 1973, Item 6, pp. 27 to 29, as indexed on 76a. The foregoing is set out in necessary detail under POINT II, pp. 37 to 45 inclusive and with particular emphasis given to the content of the Board's "Rule 11. Submission without a hearing", pp. 41 and 42 supra. It is submitted that the foregoing as a matter of law also precluded the Board from holding an "ex parte" hearing.

But more, the Court of Claims with its huge reservoir of past experience and

expertise in the review of Engineers Board's decisions was fully aware that, as based on the totality of the foregoing, plus its finely-tuned sense of justice and fair play, should have readily perceived that the merits of the appellants' claims had not been fairly and justly considered and decided by the Board, pp. 47, 52, 53 and 54 supra; consequently it should have been evident to the Court that the appellants had been denied "their day in the Board's court". That is, petitioners had been denied elemental justice by the Board, and that as such the Engineers Board of Contract Appeals' decision had paralleled a comparable situation wherein Justice Field stated:

> "A sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial

> determination of his rights, and is not entitled to respect in any other tribunal." The foregoing excerpted from "Moore's Federal Practice", Vol. 7 (1974) Paragraph 60.25(2); M. 73 pp. 309-310.

Petitioners have heretofore stated on pp. 21, 22 and 23 inclusive that "PLAINTIFFS' APPEAL FROM ENGINEERS BOARD OF CONTRACT APPEALS, DECISIONS, RULINGS AND ORDERS PROMULGATED AUGUST 28, 1979" had been solely restricted by the designated monitoring Trial Judge in the Court of Claims to the administrative claims which he had remanded to the Engineers Board by "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS" filed December 7, 1973 (see Item 6, p. 76a; underlining supplied). Apropos of the foregoing, it is to be carefully noted, pp. 24 and 25, that plaintiffs' petition of 5 July 1972 had been dismissed in toto.

But to necessarily back-track for

clarity: "Plaintiffs' Motion For Summary Judgment" was before the Court of Claims as relating only to the remanded, administrative claims supra. As based on the Court of Claims' concurrent full knowledge and as including its pertinent specific instruction to plaintiffs (67a), and informing them:

> "As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly."
>
> /s/ C. Murray Bernhardt
> Trial Judge

plaintiffs' prospective motion had a restrictive status. The foregoing instructions were given plaintiffs with the Court's full knowledge that plaintiffs' bifurcated "breach of contract claims"

were then pending before the Court awaiting adjudication. As responsive to the totality of the foregoing facts and circumstances, the Court of Claims was then faced with the single problem of deciding plaintiffs' motion for summary judgment supra and was solely restricted to the Court's consideration of the remanded administrative claims supra. That is to say, in deciding plaintiffs' summary judgment motion the Court then only had restrictive or limited subject matter jurisdiction and accordingly lacked judicial authority to dismiss the pending "breach of contract claims". The latter in that the said pending "breach of contract claims" had not been adjudicated by the Court, and consequently were not involved in the partial summary judgment motion as was sole-

ly before the Court. Accordingly, the bifurcated claims in plaintiffs' entire petition should not have been dismissed prior to a hearing on their merits, as a prerequisite to a court order of dismissal.

In partial summary of the above: plaintiffs submit that by their restricted motion for summary judgment of the claims ostensibly decided by the Board, pertinently the Court of Claims had only judicial power to dismiss those administrative claims as were before it--for proper reasons, if such existed; but it did not have collateral judicial power to dismiss the "non-adjudicated breach of contract claims" as were not included in plaintiffs' motion. The latter had a separate, distinctive, pending status under the Court's jurisdiction and were awaiting adjudication. That

is to say the Court lacked specific "partial subject matter jurisdiction" to legally state: "The petition is dismissed" (21a). The foregoing is to succinctly state that plaintiffs' "breach of contract claims" were not then "ripe" to be coupled in any manner with the Court's decision on petitioners' restricted "Motion For Summary Judgment". The Court, lacking specific subject jurisdiction, as relating to the said "breach of contract claims", was without judicial authority to indiscriminately couple and dismiss the then pending and unadjudicated "breach of contract claims". The latter <u>just because they were contained in the same original petition</u> with the remanded administrative claims. The Court was not then empowered to: "throw out the baby with the bath wa-

ter."

Accordingly, it is submitted that the "breach of contract claims" should not have been included in the Court's "Order" on "Plaintiffs' Motion For Summary Judgment", as involving only the administrative claims as had been remanded to the Board of Contract Appeals. The bifurcated "breach of contract claims" should still, as of this date, have their former pending status. Thus the Court of Claims on February 6, 1981 etc. rendered a void order by dismissing the plaintiffs' entire petition as filed 5 July 1972, and as a consequence its orders of February 6, 1981 and May 15, 1981 etc. are defective and should be vacated as a void judgment in that the said jurisdictional defect is apparent on the face of the record; and this Court is re-

spectfully requested to take note thereof and rule accordingly.

ADDITIONAL PERTINENT FACTS

The Court of Claims' Order dismissing plaintiffs' petition of 5 July 1972 is dated February 6, 1981 (1a); and Plaintiffs' "Motion For Rehearing" was denied by the Court on May 15, 1981 (21a). Following plaintiffs' letter of September 19, 1981 to the Court's Trial Judge (67a), the Court Clerk responded by letter dated September 24, 1981 (74a) and for the first time officially informed plaintiffs their petition of 5 July 1972 was dismissed "in toto". Plaintiffs subsequently filed their Motion, Brief and Appendix for the Court's Order, under its Rule 152 to "Vacate the Court's Orders of February 6, 1981 and May 15, 1981" respectively. Plaintiffs'

Motion was filed prior to May 15, 1982, approximately eight months after the receipt of the Clerk's advices supra. As pertinent to the totality of the foregoing, pp. 1 to 64 inclusive, and to all the unusual facts and circumstances as recited therein:

Petitioners submit that the time within which to submit their appeal to the Court of Claims under its Rule 152 was May 15, 1982. The latter date as predicated on this Court's ruling in Communist Party of Indiana v. Whitcomb, 441 U.S. 445; and possibly after May 15, 1982, as otherwise predicated on the Court of Claims Clerk's notice dated September 24, 1981 supra; and or thereafter as predicated on the Court of Claims' defective and void "ORDERS" of February 6, 1981 and May 15,

1981 respectively supra.

Petitioners are of the belief that the particular circumstances of this case are to the effect that the great reservoir of equitable power that resides in the Supreme Court of the United States--Radack v. Norwegian American Line Agency Inc., 318 F.2d 538--should be similarly extended in this case to the petitioners in the form of its discretionary dispensing power over any inherent limitation of time within which petitioners were required to appeal to the Court of Claims as pertinent to its Rule 152 supra (see 1a, 21a, 22a and 27a).

REASONS FOR GRANTING THE WRIT AND CONCLUSION AND PRAYER

Petitioners as predicated on the totality of the foregoing submit that the record shows:

(a) They were denied constitutional "procedural due process" by the Engineers Board of Contract Appeals; and in turn by

(b) The Court of Claims who erroneously ruled petitioners had not been denied their constitutional right to "due process" by the Engineers Board of Contract Appeals etc., and further

(c) The Court of Claims erroneously, and wrongfully dismissed plaintiffs' petition of July 5, 1972. The latter despite the fact it lacked "specific subject matter jurisdiction" to dismiss petitioners' "breach of contract claims" as were included in plaintiffs' bifurcated petition

as filed July 5, 1972.

(d) Petitioners further assert that there exists serious conflicts between the several Agency Boards of Contract Appeals as are fully set out herein, as to the proper interpretation to be placed upon basically similar regulations; and such serious conflicts should be resolved by this Court's decisions herein.

WHEREFORE petitioners pray that this Honorable Court, in its endeavors to resolve the several matters and conflicts listed above, will grant certiorari to them, and thereby potentially supply petitioners the relief to which they firmly believe they are entitled; and correlatively thereby ease the paths of other like litigants who might otherwise in the future be confronted with the same difficulties and

and torturous administrative difficulties as has been the petitioners' protracted lot herein.

Respectfully submitted,

Edmond and E. John Pfotzer
Co-partners - pro se

E. John Pfotzer - pro se

82-1328

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

EDMOND PFOTZER AND E. JOHN PFOTZER,
CO-PARTNERS Petitioners

VS

UNITED STATES
Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDMOND PFOTZER
E. JOHN PFOTZER
Petitioners pro se

Address:
P. O. Box 987
Wilmington, Delaware 19801
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IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER & E. JOHN PFOTZER	: Government contract; Wunderlich Act review; alleged violation of procedural due process hearing rights; Contract Appeals Board refusal to grant extension; non-appearance of plaintiffs and submission of case on the written record
v.	
THE UNITED STATES	

Edmond Pfotzer and E. John Pfotzer, pro se

Ray Goddard, with whom was Assistant Attorney General Alice Daniel, for defendant.

Before FRIEDMAN, Chief Judge, DAVIS and KUNZIG, Judges.

ORDER

This is a government contract action in which the plaintiffs appear pro se on the parties' cross-motions for summary

judgment. Plaintiff contractors take the position that they were deprived of procedural due process when the Corps of Engineers Board of Contract Appeals (the Board) refused to grant an extension of their hearing date, and that this resulted in a failure to comply with the Wunderlich Act, 41 U.S.C. §§ 321, 322. Defendant answers that the administrative decision is legally and factually correct, is supported by substantial evidence, and should be upheld by this court. For the reasons set forth below, we hold for defendant because we find, without need for oral argument, that there has been no violation of plaintiffs' due process rights, and that the Board's decision is in full compliance with Wunderlich Act standards.

Edmond Pfotzer and E. John Pfotzer

are partners in a business which in 1949 was awarded a contract to construct some additional filters at the filtration plant of the Washington Aqueduct in and near the District of Columbia. After completion of the work, which was delayed past the construction completion date, plaintiffs filed numerous claims with the Contract Appeals Board, relating inter alia to delays, liquidated damages and work quality. Some of these claims were the subject of the petition in the present case filed by plaintiffs in this court in 1972. As a result of discovery initiated by plaintiffs in the Court of Claims action, they were granted a stay of proceedings in this court and thereupon petitioned the Board for a rehearing of its decisions based on alleged newly discovered evidence. This motion was

granted by the Board, and plaintiffs filed twelve amended complaints with the Board by April 4, 1978. In response to several requests by plaintiffs that defendant file answers to the complaints, the Board informed the parties on June 22, 1978, that unless answers were received within 30 days, the Board would enter a general denial on the Government's behalf, as provided for in Rule 6(b) of the Board's Rules. By letter of July 14, 1978 to the Board, the Government acquiesced in the issuance of a general denial, and so informed plaintiffs. In addition to this general denial, in October 1978, the defendant filed motions to dismiss the complaints, and by order of the Board on November 9, 1978, the motions were considered as part of defendant's answers.

This order also required defendant to file more extensive answers within seven days of receipt of the order. These supplemental answers were filed on November 14, although plaintiffs allege that they did not receive them until November 27.

During August 1978, the rehearing, which had been originally scheduled at an earlier date and postponed several times pursuant to requests of both parties, was finally set for December 5, 1978. Plaintiffs objected to this date as allowing them insufficient time to evaluate the Government's motions and answers, and to prepare for the hearing, but they were unsuccessful in obtaining the three-month extension they sought. In addition to repeatedly denying plaintiffs' extension request, the Board specifically informed

plaintiffs on November 29, 1978, that

> (t)he unexcused absence of a party at the prehearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided by Rule 11.

Notwithstanding this order, plaintiffs informed the Board that they would not appear at the December 5 hearing, that they did not waive a hearing, and that they urged the Board to reconsider its denial of an extention--a denial which plaintiffs contended was a deprivation of their procedural due process rights. Plaintiffs did not appear at the hearing, and on December 11, 1978, the Board wrote plaintiffs informing them that the hearing had been held, as scheduled, that their absence had been ruled to be unexcused, and that the

case had been treated as being submitted for decision on the record, without an oral hearing for plaintiffs.

After evaluating the evidence before it, including the newly discovered evidence, the Board issued its opinion in August 1979. In it the Board denied most of plaintiffs' claims, but granted at least partial relief to plaintiffs on two of their claims.[1]

In October 1979, the Board denied plaintiffs' motion for reconsideration of its August opinion.

Plaintiffs' current motion for judgment in this court is based on the sole ground that the administrative decision should be overturned because the Board's actions with respect to the procedural as-

1/ Defendant does not challenge these allowed claims.

pects of the hearing violated their rights of due process under the Fifth and Fourteenth[2] Amendments (as well as the Board's rules, and the Disputes clause). This deprivation purportedly resulted, at least primarily, from the Board's refusal to grant plaintiffs a three-month extension of their hearing date. This action, according to plaintiffs, was sufficient to deprive them of their constitutional right to a full-scale hearing and to render the Board's decision invalid as being "capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith * * *." 41 U.S.C. § 321. Plaintiffs also argue that the Board's determination fails to meet the Wunderlich Act requirement that it be sup-

2/ Defendant's reliance on the Fourteenth Amendment is obviously misplaced since there is no state involvement in this action.

ported by substantial evidence. Id.

We conclude, on full consideration, that the record provides no support for plaintiffs' contention that they were denied procedural due process. While the exact requirements of due process may vary according to the particular circumstances of a case,

> "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." * * * "The fundamental requisite of due process of law is the opportunity to be heard," * * * a right that "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest." (Goss v. Lopez, 419 U.S. 565, 579 (1975) (citations omitted) (emphasis added).)

Accord, Boddie v. Connecticut, 401 U.S. 371, 377-78 (1971). This standard is ap-

propriate to measure the due process challenge plaintiffs now make.

There is no doubt that these requirements of notice and an opportunity to be heard were fully granted to plaintiffs in this instance. As early as August 1978, plaintiffs were informed by the Board that the rehearing would be held on December 5, 1978. In addition to this period of time between notice and hearing, plaintiffs had a five-year period between the 1973 suspension of proceedings in this court and the December 1978 Board hearing involved here in which to prepare their case.

Plaintiffs contend, however, that there was not sufficient time for them to prepare their case by the scheduled hearing date in light of the failure to receive defendant's answers to their com-

plaints until November 27, 1978, a week before the hearing, and the fact that they had received defendant's motions to dismiss only in October of that year. While it is true that pursuant to the Board's November 9, 1978 request for more detailed answers defendant filed supplemental answers with the Board on November 14 (which plaintiffs allege they did not receive until November 27), plaintiffs were informed as early as July 1978 that defendant had acquiesced in the Board's entrance of a general denial on defendant's behalf.[3] Thus,

3/ This general denial was made in compliance with Rule 6(b) of the Board's Rules which allows the Board to enter such a response if the Government has not filed its answers within 30 days after receipt of the complaint, as was the case here. The Board was not, as plaintiffs urge, required to do so within 30 days of defendant's receiving the complaint; rather, it had the discretion to do so after 30 days had elapsed.

plaintiffs were aware of the Government's overall position long before the hearing date. They also had over a month between the time they received the Government's motions to dismiss and the date of the hearing. In addition, as the Board correctly stated, "(a)ppellant had the burden of proof and should not--in this case--have expected Answers which relieved it of any substantial part of its obligation to support its Amended Complaints with evidence." Board Decision of August 16, 1979, at 5. There is also support for the reasonableness of denying further extensions in the fact that the claims at issue arose from a contract which was performed by 1950, and these and similar claims had been litigated by the parties in various forums throughout the period between 1950

and 1978.[4] Based on these specific facts

4/ In its decision of October 26, 1979, denying reconsideration of its prior holding of August 16, 1979, the Board pointed out:

> We concluded that the Appellant had stated its claims in 1949-1950, had restated them in its pleadings in the period 1950-1965, that it had added more detail in its memoranda filed in 1977, that it had re-pled (sic) its cases in the spring of 1978. Further the Respondent had stated its position in the contracting officer final decisions, and in its original pleadings. In addition the Appellant had obtained extensive discoery of the Government's files and only remaining witness several times since 1973. In the summer of 1978 the Board and the Government indicated that general denials would be entered in these appeals and in the June-August 1978 period the cases were scheduled for trial on 5 December 1978. Thus we find it hard to believe that after 30 years of correspondence, decisions, pleadings, and discovery the Appellant was not ready for the 5 December 1978 proceedings because it had only received the latest Government answers on November 27, 1978.

and the long history of the case, we cannot say that it was a violation of procedural due process for the Board to refuse to grant yet another postponement of the hearing date.[5]

Nor may plaintiffs draw a constitutional violation from their deliberate refusal to attend the hearing. Due process requires the opportunity for a hearing, Goss, supra, 419 U.S. at 579, not a right to ignore a properly scheduled hearing date and then to attack the decision of the administrative body on the ground that there was no hearing. Plaintiffs elected not to attend and cannot now say that they were denied an opportunity to do so. They

5/ The evidence in the record provides no support for plaintiffs' contention that the court discriminated against them in the granting of postponements and continuances.

plainly could have appeared and presented their affirmative case which caused them to seek rehearing. Furthermore, plaintiffs were warned by the Board that, if they did not appear, their nonappearance would be deemed an unexcused delay and they would be considered to have waived their right to a hearing.[6]

6/ Plaintiffs assert that the Board's actions impaired not only their opportunity to be heard, but also other elements of a constitutionally adequate hearing such as an unbiased tribunal and avoidance of ex parte communications which plaintiffs interpret as prohibiting hearings at which only one side appears. Plaintiffs do not support these allegations with any facts or analysis, and we find them to be without merit. With respect to the so-called ex parte hearing, the only reason it was "ex parte" is because of plaintiffs' unexcused absence. Nor do we find, as plaintiffs contend, that the Board was partial to defendant because it ruled against plaintiffs on the extension issue. Our examination of the record has uncovered no evidence of partiality to either side.

16a There is likewise no support for plaintiffs' contention that the Board violated its own rules in refusing to grant the requested three-month delay. On the contrary, the Board properly interpreted and applied its rules. Rule 11 provides that while both parties are entitled to a hearing, either may waive a hearing and submit its case upon the record. Under Rule 19,

> (t)he unexcused absence of a party at the time and place set for hearing will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

Nothing could be clearer than that these rules applied to the plaintiffs' situation and permitted the Board to waive the hearing and submit plaintiffs' case on the record. Not only is this language straight-

forward and its meaning plain, but the Board informed plaintiff of its meaning before the hearing took place.

Plaintiffs also urge that the Preface of the Rules, Rule 17, and Rule 18 were violated by the Board's refusal to advance the hearing date. These provisions, which deal with such matters as the scheduling of hearings, give the Board discretion to extend time limits and to give "due regard to the desires of the parties, and to the requirement for just and inexpensive determination of appeals without unnecessary delay." The rules thus require a balancing of the competing interests of good cause for time extensions versus the avoidance of unnecessary delays. Taking into consideration the circumstances of the instant request, discussed supra, we find that the

Board was acting within its discretion when it decided that an additional postponement of the hearings was not necessary or desirable.[7]

Similarly for the argument that the Board's actions violated the Disputes Clause (Article 15). That provision required, as usual, that factual disputes be resolved by the contracting officer whose decision would be appealable to the head of the Corps of Engineers or his representative. Plaintiffs read a good faith standard into this Article and assert that

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7/ Plaintiffs cite two other provisions which they believe were violated: Rule 5 (dismissal for lack of jurisdiction) and Preface Paragraph (a) (requiring the full consideration of appeals). Since the Board clearly had jurisdiction over these claims, and there is no evidence that the Board did not fully and carefully consider plaintiffs' appeals, these rules were fully complied with.

it was violated by the Board's allegedly arbitrary and erroneous refusal to grant the extension request. But as we have already pointed out supra, there was no deprivation of procedural due process, the Board followed its own procedural rules, and did not abuse its discretion. The Disputes Clause gave plaintiffs no greater procedural rights which the Board could have breached.

Finally, we come to plaintiffs' argument that the Board's decision lacks finality because it is not supported by substantial evidence. 41 U.S.C. Section 321. The sole basis for this position is that, because the Board acted improperly in refusing to reschedule the hearing, none of the evidence upon which the Board based its decision should properly have been con-

sidered and therefore the decision was unsupported by any evidence. This argument must, of course, fail because we have already held that the Board did act constitutionally, and within its powers and discretion. There can be no doubt that the Board could rely on the evidence in the written record and the evidence which defendant presented at the December 5 hearing. As plaintiffs point to no other basis for their argument grounded on lack of substantial evidence, defendant has no responsibility to prove that the Board's decision was based on sufficient evidence, and the court need not search the record to make an independent determination on that issue. See, LSi Service Corp. v. United States, 191 Ct. Cl. 185, 188, 422 F.2d 1334, 1335-36 (1970).

For these reasons, defendant's motion for summary judgment is granted, and plaintiff's motion is denied. The petition is dismissed.

IT IS SO ORDERED.

FEB 6 - 1981

BY THE COURT

/s/ Daniel M. Friedman

Daniel M. Friedman
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER AND
E. JOHN PFOTZER

V.

THE UNITED STATES

Before FRIEDMAN, Chief Judge,
DAVIS and KUNZIG, Judges.

ORDER

PER CURIAM: This case comes before the court on plaintiffs' motion, filed April 17, 1981, for rehearing pursuant to Rule 151 (b), with reference to the order entered herein on February 6, 1981, dismissing the petition. Upon consideration thereof, without oral argument,

IT IS ORDERED that plaintiffs' said motion for rehearing is denied.

MAY 15 1981

IN THE UNITED STATES COURT OF CLAIMS

NO. 274-72

EDMOND PFOTZER AND E. JOHN PFOTZER	:	Rehearing under Rule 152(b); "reasonable time."
V.	:	
THE UNITED STATES	:	JUL 16 1982

Edmond Pfotzer and E. John Pfotzer, pro se.

Lenore C. Garon, with whom was Assistant Attorney General J. Paul McGrath, for defendant.

Before FRIEDMAN, Chief Judge, and DAVIS, Judge.

ORDER

PER CURIAM: In this contract case, the court denied plaintiffs' motion for summary judgment, granted defendant's motion, and dismissed the petition. Order of February 6, 1981. Rehearing was denied by Order of May 15, 1981. The present motion (filed May 10, 1982) is for relief under Rule 152(b). The ground is that our order of February 6, 1981 (confirmed by the denial of rehearing on May 15, 1981) pro-

perly dismissed not only the Wunderlich Act claims heard and decided by the Board of Contract Appeals, but also independent "breach" claims, said to be stated in the petition, over which that Board had no jurisdiction, and which should be tried in this court.

We assume, without deciding, that the petition embodies such "breach" claims separate and apart from the Wunderlich Act claims, but nevertheless we deny the current motion under Rule 152. The conditions of that Rule have not been satisfied. Plaintiffs invoke three parts of the Rule, i.e., (b)(1), (b)(4), and (b)(6). Subsection (b)(1)--"mistake, inadvertence, surprise, or excusable neglect"--is inapplicable because it requires that the motion be made not more than a year after

the order complained of, and here the dispositive order was entered on February 6, 1981, while the current motion was not filed until May 10, 1982, considerably more than a year later.

Subsection (b)(4) deals with a "void" judgment and requires that a motion under Rule 152 "shall be made within a reasonable time." In this case the order and judgment of February 6, 1981, was not "void" even if it was mistaken. The Court of Claims plainly has jurisdiction over "breach of contract" claims and an erroneous dismissal of the "breach" claims would not be "void" for lack of jurisdiction.

Subsection (b)(6) concerns "any other reason justifying relief from the operation of the judgment," and, again, must be made "within a reasonable time." Even if

this general provision is available to them, plaintiffs have not sought relief within a reasonable time. When the court considered the cross-motions for summary judgment, plaintiffs did not call the court's attention to any separate "breach" claims, nor did they, after the issuance of the order of February 6, 1981, call the court's attention, in any proper fashion, to their contention that separate "breach" claims had been incorrectly dismissed. Their own papers on the instant motion show that they soon understood that the entire petition (including any "breach" claims) had been dismissed by the order of February 6, 1981. But their first motion for rehearing (filed after they had become so aware) did not alert the court to that aspect of the case or

ask for its rectification. And, after rehearing was denied on May 15, 1981, plaintiffs were formally and expressly informed by the Clerk in a letter of September 24, 1981, that the entire petition had been dismissed. But the instant motion was not made until May 10, 1982, some seven months later. Plaintiffs have not acted within reasonable time, as the Rule demands. *

Plaintiffs motion under Rule 152(b) is denied.

JUL 16 1982

*/ For the same reasons, their motion under Rule 152(b)(4) was not filed within a reasonable time.

IN THE UNITED STATES COURT OF CLAIMS

September 10, 1982

ORDER

PER CURIAM: IT IS ORDERED that the

motions of the parties as set forth, for rehearing, reconsideration or other relief under Rules 7(d), 151 and 152 are DENIED:

App. 18-80 Jerald H. Miller
Petitioner's motion for reconsideration filed August 31, 1982 of order dated July 16, 1982. (FRIEDMAN, Chief Judge, NICHOLS and KASHIWA, Judges

274-72 Edmond Pfotzer and E. John Pfotzer
Plaintiffs' corrected reply memorandum received August 27, 1982, treated as plaintiffs' motion for rehearing of order dated July 16, 1982. (FRIEDMAN, Chief Judge and DAVIS, Judge)

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON,D.C. 20314

DAEN-CCB 26 June 1978
CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Mr. E. J. Pfotzer
P. O. Box 987
Wilmington, Delaware 19899

Re: Appeals of E. & E. J. Pfotzer
Docket Nos. Eng C&A 500, BCA 2581, 2587, 2618 & 2678

NOTICE OF HEARING

Dear Mr. Pfotzer:

You are advised that a full-scale hearing in connection with the above-captioned appeals has been scheduled to commence at 10:00 AM, Tuesday, 19 September 1978 in the Forrestal Building, 1000 Independence Avenue, Washington, D. C.

You will be notified at a later date as to the exact location and room number of the hearing.

In the event of unexcused absence of either party or counsel, the appeal will be considered as having been submitted on the part of the absent party.

The Board requires both parties to exchange copies of any reproducible exhibit which is to be introduced into evidence at the hearing. It is preferred that this exchange take place prior to the hearing but if not, it is to be accomplished in such a way that the progress of the hearing is not impeded. Every reasonable effort is to be made to assure that Appel-

lant and the Government are provided with a duplicate of the exhibits furnished the Board. Unless good cause is shown the Board will look with disfavor on any request to withdraw exhibits for copying after the record is closed.

Sincerely yours,

/s/ Frances H. Aceto
FRANCES H. ACETO
Recorder, Corps of Engineers
Board of Contract Appeals

Copies furnished:
Howard A. Pollack, Esq.,
Baltimore District
DE North Atlantic Division
Gary W. Hudiburgh, Esq.,
DAEN-CCF OCE

Hon. George S. Steele, Jr. : Re: Appeals
Administrative Judge : of E. & E.J.
Department of the Army : Pfotzer,
Office of the Chief of : Appellants,
Engineers : Contract No.
Washington, D. C. 20314 : DA-49-080-Eng.-27, Dalecarlia Filters, Docket No. C&A 500 Etc.

(and U.S. Court of Claims Action No. 2618)

November 8, 1978

(1) APPELLANT'S MOTION FOR POSTPONEMENT OF PRESENT HEARING DATE AND (2) FOR ADDITIONAL TIME TO RESPOND TO RESPONDENT'S MOTION TO DISMISS AND/OR STRIKE TWELVE SEPARATE CLAIMS

(1) Appellants find it necessary to request postponement of the present hearing date, for the herein subject claims, as before the Board, from December 5, 1978 to March 1,1979.

(2) Also, appellants request fifty additional days time, beyond the present twenty day time limit, such as required to respond to respondents motion as filed simultaneously with the Board, under date of October 26, 1978, to cover dismissal and/or striking of twelve of appellants individual claims.

(3) Appellants will file their brief with the Board in support of the herein motion, on or before November 1, 1978.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

CC: Howard A. Pollack, Esq.
Acting District Counsel

Timothy A. Sullivan, Esq.
Engineer Trial Attorney

E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr. Administrative Judge Department of the Army Office of the Chief of Engineers Washington, D. C. 20314	Re: Appeals of E. & E. J. Pfotzer, Appellants Contract No. DA-49-080-Eng -27, Dalecar- lia Filters, Docket No. C&A 500 Etc. (and U.S. Court of Claims Action No. 2618). November 10, 1978

BRIEF IN SUPPORT OF APPELLANTS MOTION DATED NOVEMBER 8, 1978 FOR POSTPONEMENT OF HEARING DATE; AND FOR ADDITIONAL TIME

TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE TWELVE APPEALS.

STATEMENT

Appellant has for a long time past, beginning with June 20, 1978 urged respondent to file its written answers to appellants amended complaints, and concurrently stressed that its failure to do so threatened to ultimately delay appellants preparation for the hearing; however, all such efforts have been ignored. REspondents indirect position as indicated appears to be that it may make an oral answer to appellants eleven written amended complaints on the first day of the hearing.

In this matter, above all, appellants seek to "secure a just and inexpensive determination of appeals without unnecessary delay." However, it is evident, that

such cannot be attained without respondents answers having been timely filed with the Board. A verbal answer to each of the claims at the beginning of the hearings is clearly inadequate insofar as complying with formal requirements of an answer in a pleadings procedure.

It is further submitted that beside a pre-hearing conference as presently outlined requiring substantial time for proper preparation by appellant in order to satisfy the most comprehensive agenda; there has also been placed before appellant, at this late date, the formidable task of adequately responding to respondents motions to dismiss and/or strike, twelve of appellants appeals, such motions all filed in one day, October 26, 1978, with the Board, such rather than being

filed singly in normal order as completed. Under these most difficult circumstances for appellant, respondent has informed the Board it is ready to proceed with a hearing.

Appellant respectfully submits that a just determination of the claims cannot be made under such conditions. It is at once manifest that respondents timely written answers to appellants eleven amended complaints, in fairness to appellant and the Board, should be filed with the Board, in order for it to determine the real and/or proper issues. Failing in the latter the Board's judgment, as well as appellant's cause may suffer. REspondent cannot properly be considered ready for a hearing, as it states, in that it has not to this date filed its answer to a single complaint, as before the Board. Nor has it

filed its motions to dismiss and/or strike twelve of appellants claims in reasonable or timely procedural sequence, so as to thereby allow appellant sufficient time to respond.

ARGUMENT

N.B. Next 10 pages have for brevity been omitted.

CONCLUSION

It is submitted, upon the basis of the record and pertinent facts, as hereinabove set forth, that the postponement of the hearing date; and enlargement of time for filing appellant's responses to defendant's motions to dismiss and/or strike, should be allowed as a matter of elemental fairness.

Respectfully submitted,

E. & F. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr.
Administrative Judge
Department of the Army
Office of the Chief of Engineers
Washington, D. C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants,
:Contract No.
:DA-49-080-Eng.
-27, Dalecarlia
Filters, Dock-
et No. C&A 500
Etc.
(and U.S. Court of Claims Action No. 2618)

November 14,
1978

SUPPLEMENTARY BRIEF IN SUPPORT OF APPELLANT'S MOTION DATED NOVEMBER 8, 1978, FOR POSTPONEMENT OF HEARING DATE; AND FOR ADDITIONAL TIME TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE TWELVE OF APPELLANT'S APPEALS.

Appellant refers herein to respon-

dent's letter, dated November 9, 1978, to the Board relating to appellant's request for a continuance of the hearing scheduled date from December 5, 1978 to March 1, 1979.

Incidentally, appellants request a correction be made in its brief, dated November 10, 1978, filed with the Board, bearing upon the present matter. In this connection, reference is made to the last line on page two thereof. Please correct phrase therein, which should read: "and it is upon such premise", the word is was omitted.

STATEMENT OF FACTS, INCLUDING RELATED ARGUMENT

(1) It is again noted, that the hearing date of December 5, 1978, was selected by respondent to suit, as stated for its con-

venience, and to which appellant made no objection.

(2) Respondent has stated in its herein subject letter that "Appellant has offered no reason, justifiable or otherwise, for the postponement." Further, respondent has added, "Such request for postponement, in light of all these circumstances, appears unconscionable and unwarranted. Also, it is noted, respondent has stated: "Such request is highly unreasonable."

(4) The foregoing statements were made by respondent, having substantially, with respect to pertinent facts as then of record, the same knowledge as possessed by appellant; and which knowledge, should in appellants opinion, not have made it possible for respondent to make such broad misstatements, all of which are contrary

to the real facts.

(5) In support of the foregoing statement appellant refers to its memorandum, as before the Board, dated November 1, 1978: "Re: Notice of Pre-Hearing Conference" wherein four reasons are set forth in support of the therein request for a continuance of the subject conference.

(6) Pursuantly, appellant further refers to its motion, dated November 8, 1978, as before the Board, for a continuance of the hearing date from December 5, 1978 to March 1, 1979; and for fifty additional days time to respond to respondents motion to dismiss and/or strike twelve of appellants claims as before the Board.

(7) It is relatedly submitted that respondents fore-mentioned motions to dismiss and/or strike as in keeping with applicable

Federal Rules should properly have been filed with the Board in the early stages of the proceedings or within a reasonable time after the filing of appellants amended complaints, and not at a time shortly before the shceduled hearing date.

N.B. The next four pages have been omitted.

CONCLUSION

For the added reasons, as noted above, appellant submits its motion, as before the Board, dated November 8, 1978, should be allowed.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON,D.C. 20314

Before the Corps of Engineers Board of Contract Appeals

Appeals of	:
	: C&A NO.500,
E. & E. J. Pfotzer	: Eng BCA
	: NOS. 2581,
Contract No. DA-49-080-ENG-27	: 2587, 2618
	: & 2678

ORDER ON MOTIONS

The Board has carefully considered Appellant's Motions to (1) postpone the hearing from 5 December 1978 to 1 March 1979 and (2) for fifty more days to respond to Respondent's Motions to Dismiss filed 26 October 1978, and Appellant's arguments in support thereof dated 10 November 1978.

We do not find any prejudice to Appellant in conducting a pre-hearing conference on 5 December 1978 and immediately thereafter conducting the hearing in furtherance of the Board's 28 February 1975 Order. Appellant will in our view have had sufficient opportunity by 5 December 1978 to get ready for the pre-hearing and the hearing.

Appellant's motions are denied.

Date: 15 November 1978

/s/ George S. Steele, Jr.
GEORGE S. STEELE, JR.
Administrative Judge

I concur:

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ E. K. McFadden
E. K. McFADDEN
Administrative Judge

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief of
Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer
:Appellants
:Contract No.
:DA-49-080-Eng.-
27, Dalecarlia
Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims,
Action No. 2618)

November 18,1978

RENEWAL OF APPELLANT'S MOTION, DATED NOVEMBER 8, 1978, FOR ENLARGEMENT OF TIME TO RESPOND TO RESPONDENT'S MOTIONS TO DISMISS AND/OR STRIKE

(1) Appellant herein refers to the Board's order, dated November 9, 1978, received by appellants on November 16, 1978, at 4:00 p.m., and particularly to the reference therein on page two, second paragraph, and which reads, quote "The Board will rule on Respondent's Motions to Dismiss on or after 21 November 1978 thus Appellant, as notified by letters dated 26 October 1978, should file any brief so

that it reaches the Board before 21 November 1978."

(2) Appellants received the Board's above referenced letter, dated October 26, 1978, on October 31, 1978.

(3) Under date of November 8, 1978, appellant by motion, filed with the Board, requested that the Board enlarge the twenty day return time for appellant to respond to respondents motion by fifty additional days. Appellant has received no response to its motion from the Board, nor from respondents to the present date, nor to its brief in support of motion dated November 10, 1978, nor to its supplementary brief in support of motion, dated November 14, 1978. Appellant's above noted correspondence, is hereby made a part of this communication by ref-

erence to the same effect as though herein set forth in its entirety.

(4) Pertinently, it is noted that respondent's motion to dismiss involves twelve claims, all filed upon the same day. Respondents subject motions are involved and complex in their substance; and as such, require time consuming review of the extensive record, and careful research of related law.

(5) In paragraph seven of appellant's supplementary brief, dated November 14, 1978, in support of its motion, appellant stated that respondents motion should properly have been filed with the Board in keeping with provisions of Federal Rules, in the early stages of the proceedings, or within a reasonable time after filing of appellants amended com-

plaints, and not at a time shortly before the scheduled hearing date.

(6) In its supporting brief of November 10, 1978, appellant on page two stated, with respect to its motion "There has also been placed before the appellant, at this late date, the formidable task of adequately responding to respondents motions to dismiss and/or strike, twelve of appellants appeals, such motions all filed in one day, October 26, 1978, with the Board, such rather than being filed singly in normal order as completed.

(7) In further reference to appellant's position in the subject matter it is submitted that the Board rules reasonably contemplate 20 days time in which to respond to a single claim, and not 20 days in which to respond to motions for twelve

claims, as suddenly filed in a single day, en masse. In support of the foregoing appellant refers to Preface to Board rules, paragraph (c):

> (c) Emphasis is placed upon the sound administration of these rules in specific cases, because it is impracticable to articulate a rule to fit every possible circumstance which may be encountered. These rules will be interpreted so as to secure a just and inexpensive determination of appeals without unnecessary delay.

and also to paragraph (d):

> (d) Preliminary procedures are available x x x to discourage unwarranted surprise.

and similarly to paragraph (e):

> (e) All time limitations for procedural actions x x x. These time limitations are similarly eligible for extension in appropriate circumstances, on good cause shown.

N.B. Remainder of content is omitted

to the conclusion.

(14) In conclusion, appellant requests the Board's consideration of the hereinabove subject matter; and further appellant renews its prior motion dated November 8, 1978, for enlargement of time, in which to respond to respondent's subject motions, by 50 days, to be added to the originally stated 20 days, such period of time to begin with the date of respondent's compliance with provisions of pertinent rules as set forth hereinabove.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief of
Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants
:Contract No.
:DA-49-080-Eng-
:27. Dalecarlia
Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims
Action No. 2618).
November 22, 1978

MOTION TO STAY AND/OR HOLD IN SUSPENSE APPELLANT'S MOTION OF NOVEMBER 18, 1978 FOR ENLARGEMENT OF TIME, ETC., UNTIL SUCH TIME AS RESPONDENT REINSTATES ITS THEREIN REFERENCED MOTION

Appellant refers to telephone advice received from respondent, Lawrence E. Leykam, Esq., Division Chief Trial Attorney, at 4:00 p.m., November 14, 1978, informing appellant of respondents withdrawal of its Motions to Dismiss twelve of appellants claims, except two elements thereof as settled.

The latter as similarly referred to in portions of first and second paragraphs

of letter dated November 17, 1978 addressed to the Board, and received by appellant, from respondent, Timothy A. Sullivan, Trial Attorney.

Respondent therein stated in part "x x x the Government hereby withdraws its Motion to Dismiss in CA 500 and ENG. BCA 2678 without prejudice to future reinstatement with the exception of those elements of the motion which address claims "H" and "I".

Respondent in its letter, therein continued as follows: "The withdrawal of these motions will eliminate the need for the appellant to prepare response to the major portion of the motion. Those portions of the motion not withdrawn were made the basis of an accord and satisfaction and involve no litigable issue as

those claims were settled in 1954."

In accord with the above, appellant submits its herein captioned motion, and as such superseding its motion of November 18, 1978; and further requests that such motion, of November 18, 1978, be stayed and/or held in suspense until such time as respondent reinstates its subject motion.

In consideration of these representations, appellant requests the Board grant its herein stated motion.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF ENGINEERS
WASHINGTON, D.C. 20314

Before the Corps of Engineers Board of Contract Appeals

Appeals of : C&A No. 500,
: ENG BCA 2581,
E. & E. J. PFOTZER : 2587, 2618 & 2678

Contract No. DA-49-080-ENG-27

ORDER

The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in Eng BCA 2678 unless the 5 December 1978 hearing is postponed.

The Board allows Respondent's 17 November 1978 motion to withdraw its motion to dismiss filed in C&A 500 (except as it relates to claims H and I) unless the 5

December 1978 hearing is postponed.

Notwithstanding the above decisions the issues to be decided hereafter are those set out in the Board's 28 February 1975 order.

Appellant's "Motion to Stay and/or hold in Suspense Appellant's Motion of Nov. 18, 1978 for enlargement of Time, etc., Until Such Time as Respondent Reinstates its therein Referenced Motion" dated 22 Nov. 1978 is allowed.

Appellant's "Renewal of Appellant's Motion, dated Nov. 8, 1978, for enlargement of Time to Respond to Respondent's Motions to Dismiss and/or strike" dated 18 November 1978 is put in suspense in accordance with paragraph 4 above.

"Appellant's Partial Brief in Response to Board's Order of November 9,

1978, Regarding the Board's Alleged Order of June 22, 1978" is noted. The issues to be heard on 5 December 1978 are those established by the Board's 28 February 1975 order. Appellant's statements thereof appear in its Amended Complaints. Respondent's Answers, with the addition thereto of its Motion to Dismiss in C&A 500 as to claims H and I, set forth the Respondent's defenses.

The unexcused absense of a party at the pre-hearing conference or at the hearing on 5 December 1978 will not be occasion for delay. In the event of such absence, the hearing will proceed and the case will be regarded as submitted by the absent party as provided in Rule 11.

Date: 29 November 1978

/s/ George S. Steele,
GEORGE S. STEELE, JR.

I concur:

/s/ John P. Jellico
JOHN P. JELLICO
Administrative Judge
Chairman

I concur:

/s/ E. K. McFadden
E. K. McFADDEN
Administrative Judge

Hon. George S. Steele, Jr:
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants,
:Contract No.
:DA-49-080-Eng.-
:27. Dalecarlia
:Filters, Docket
No. C&A 500 Etc.
(and U.S. Court of Claims,
Action No. 2618.)

December 3, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation Western Union Night Letter of December 3, 1978)

It is with great regret that appellant finds it must advise that because of the

Board's denial of sufficient time to prepare its case, and of other good cause, all as of record, it cannot appear at December 5, 1978 hearing. Appellant's action is necessary as a direct consequence of continuing prejudicial developments stemming from respondent's improper tactics, which have precluded normal procedural due process for appellant. Thereby placing appellant's claims in great jeopardy. Account of other good cause follows. Appellants are hopeful that the Board will find its way clear to reschedule the hearing to March 1, 1979, or preferably thereafter.

Respectfully submitted,

E. & E. J. Pfotzer

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Laykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr.
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

Re: Appeals of
E. & E. J.
Pfotzer,
Appellants,
Contract No.
DA-49-080-Eng-27
Dalecarlia Fil-
ters, Docket No.
C&A 500 Etc.
(and U.S. Court of Claims
Action No. 2618.)

December 4, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation of Western Union Telegram of December 4, 1978.)

Pursuant to our telephone conversation of this morning. We respectfully protest possible Board action granting respondent permission to present its case without

our appearance on December 5, 1978. Also we do not waive a hearing, nor agree to submitting our case on the record. In addition we request that prior to further action in the matter you review our request as made in our telegram of December 1, 1978 for reconsideration of request for rescheduling of hearing date.

Respectfully submitted,

E. & E. J. PFOTZER

/s/ E. John Pfotzer
E. John Pfotzer

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

Hon. George S. Steele, Jr
Administrative Judge
Department of the Army
Office of the Chief
of Engineers
Washington, D.C. 20314

:Re: Appeals of
:E. & E. J.
:Pfotzer,
:Appellants
:Contract No.
:DA-49-080-Eng-27
:Dalecarlia Fil-
:ters Docket No.
C&A 500 Etc.

(and U.S. Court of Claims,
Action No. 2618)

December 5, 1978

RE: SCHEDULED BOARD HEARING OF DECEMBER 5, 1978.

(Confirmation of Western Union Telegram of December 5, 1978; message also telephoned to Board byappellant at 8:15 a.m., December 5, 1978.)

Reference is first made to appellant's telegrams dated December 1 and 4 requesting the Board's reconsideration of its order of November 15, 1978; and second for rescheduling of date as requested for full scale hearing. Pertinently, it is considered that the Board's order dated

November 15, 1978, is against the preponderant weight of the evidence; such evidence establishing as a fact denial of due process in proceedings since June 20, 1978, by reason of enforced interference with appellant's case preparation.

Further, it is with deep regret that appellant advises, in event new date for full scale hearing is not allowed, that it appears appellant will thereafter have no alternative, but to petition the Court of Claims for a hearing of all its claims de novo, under pertinent provisions of the Wunderlich Act.

Supporting brief follows.

Respectfully submitted,

/s/ E. John Pfotzer
E. John Pfotzer
(E. & E. J. Pfotzer)

cc: Timothy A. Sullivan, Esq.
Engineer Trial Attorney

Howard A. Pollack, Esq.
Acting District Counsel

Lawrence E. Leykam, Esq.
Division Trial Attorney

MAILGRAM SERVICE CENTER WESTERN UNION
MIDDLETOWN, VA. 22645 MAILGRAM

4-009184E340002 12/06/78 ICS IPMMTZZ
CSP WILA
1 3027645010 MGM TDMT WILMINGTON DE
12-06 0848A EST

E J PFOTZER
4 RIVERSIDE DR
WILMINGTON DE 19809

THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:

3027645010 MGM TDMT WILMINGTON DE 1 45
12-06 0848A EST
ZIP
GEORGE S STEELE JR, ADMINISTRATIVE JUDGE
DEPT OF THE ARMY
OFFICE CHIEF OF ENGINEERS
BOARD OF CONTRACT APPEALS
MRS FRANCES H ACATO RECORDER
1000 INDEPENDENCE AVE SOUTHWEST FORRESTAL
BLDG DAEN-CCB
WASHINGTON DC 20314

RE BOARD HEARING SCHEDULED FOR DECEMBER 5TH:

APPELLANT, AS IN THE PERTINENT RECORD, PROTEST APPARENT HEARING OF APPELLANTS CLAIMS AS UPON BASIS OF RESPONDENTS TESTIMONY ALONE, AND IN THE ABSENCE OF APPELLANT SUCH PROCEDURE IS CONSIDERED AS BEING IN VIOLATION OF DUE PROCESS, UNDER AND AS SUCH PREJUDICIAL TO APPELLANTS PROPER HEARING BEFORE THE BOARD, AND ALSO AS SUCH PREJUDICIAL TO APPELLANTS POSSIBLE HEARING BEFORE THE COURT OF CLAIMS. ALL THE FOREGOING AS SUPPORTED BY APPELLANTS TELEGRAM OF DECEMBER 5TH TO THE BOARD, AND OF PREVIOUS RELEVANT COMMUNICATIONS AS OF RECORD. FURTHER, APPELLANT MOVES OF ANY PROCEEDINGS AS OF YESTERDAY, OR TO BE HELD IN THE FUTURE IN THE NATURE OF A HEARING AS REFERRED TO ABOVE, BE DECLARED AS AGAINST DUE PROCESS, AND THE PERTINENT PROVISIONS OF THE WUNDERLICH ACT, AND SHOULD THEREFORE BE STRICKEN AS INVALID

E AND E J PFOTZER

0849 EST

MGMCOMP MGM

MAILGRAM SERVICE CENTER WESTERN UNION
MIDDLETOWN, VA 22645 MAILGRAM

4-027832E351002 12/17/78 ICS IPMMTZZ
CSP WILA
1 3027645010 MGM TDMT WILMINGTON DE
12-17 0904P EST

E J PFOTZER
4 RIVERSIDE DR
WILMINGTON DE 19809

THIS MAILGRAM IS A CONFIRMATION COPY OF
THE FOLLOWING MESSAGE:

3027645010 MGM TDMT WILMINGTON DE
380 12-17 0904P EST
ZIP
HONORABLE C MURRAY BERNHARDT, TRIAL JUDGE
UNITED STATES COURT OF CLAIMS
717 MADISON PL NORTHWEST
WASHINGTON DC 20005

I HEREBY ACKNOWLEDGE AND RESPOND TO YOUR LETTER OF NOVEMBER 16, 1978; AND SINCERELY APOLOGIZE FOR NOT HAVING HERETOFORE ANSWERED. PURSUANTLY, I WAS IN THE INTERIM INVOLVED IN A MOST DIFFICULT PROCEDURAL SITUATION, AND ONE OVER WHICH I HAD NO CONTROL. SUCH UNAVOIDABLY CULMINATING IN MY PROTRACTED DELAY IN RESPONDING TO YOUR LETTER; AND AS SOLELY STEMMING FROM A DAY TO DAY EXPECTATION THAT THE INVOLVED SITUATION MIGHT BE RESOLVED AMICABLY; AND YOU THEN SO ADVISED.

SPECIFICALLY, WITH RESPECT TO THE PRESENT

STATUS OF OUR CLAIMS BEFORE THE ENGINEERS BOARD OF CONTRACT APPEALS, I WOULD INI - TIALLY ADVISE THAT SINCE LEAVING YOUR COURT, A GREAT AMOUNT OF DIFFICULT, AND DETAILED PROCEDURAL WORK WAS DEMANDED OF, AND REQUIRED TO BE PERFORMED BY US, AND ALL OF WHICH WAS TIMELY ACCOMPLISHED, AS ON THE RECORD.

HOWEVER, OVER THE COURSE OF THE LAST FIVE MONTHS, AS ALSO ON THE RECORD, THE IN- VOLVED RESPONDENT HAS FAILED, IN FACT, UNTIL RECENTLY TO FILE ITS ANSWERS TO OUR AMENDED COMPLAINTS. THE LATTER DESPITE OUR REPEATED URGING, AS OF RECORD, BEFORE THE BOARD TO HAVE TIMELY DONE SO.

AS A CONSEQUENCE OF THE GREAT DELAY IN RESPONDENT'S FILING, AND DESPITE OUR SUB- SEQUENT NECESSARY REQUEST TO THE BOARD FOR A POSTPONEMENT OF DECEMBER 5 1978 SCHEDULED HEARING DATE (FOR ALL THE CLAIMS), TO COVER DELAYS NOT OF OUR MAK- ING, IN OUR CASE PREPARATION FOR TRIAL, AND TO THEREBY PERMIT US TO MEET RESPON- DENT'S DELAYED ANSWERS. THE BOARD DESPITE OUR TIMELY PROTEST, AND NECESSARY IMPOR- TUNITIES, NEVERTHELESS ADAMANTLY HELD THE SCHEDULED HEARING WITHOUT OUR PRESENCE.

PURSUANT TO THE SAID UNILATERAL HEARING, WE HAD TIMELY INFORMED RESPONDENT, AND THE BOARD, THAT WE COULD NOT ADEQUATELY COMPLETE OUR PREPARATION FOR THE HEARING, DUE TO RESPONDENT'S EXTENDED DELAY OF FIVE MONTHS, IN FILING ITS ANSWERS TO OUR AMENDED COMPLAINTS. OUR REPEATED AND TIMELY REQUESTS FOR RECONSIDERATION IN-

VOLVING A POSTPONEMENT OF THE DECEMBER 5 1978 HEARING IS PENDING BEFORE THE BOARD.

IN ACCORD WITH THE FOREGOING: WE ADVISE THAT AS SOON AS THIS MOST CRITICAL ASPECT OF THE SITUATION, WITH ITS HIGH UNCERTAINTY IS SETTLED, WE WILL BE IN A POSITION OF FULLY INFORMING YOU OF DEVELOPMENTS, AND OF THE STATUS OF THE SUBJECT MATTER, AND ALL AS PREDICATED ON PROGRESSIVE EXHIBITS OF RECORD.

(NB COPIES TO ALL INVOLVED PARTIES).

VERY TRULY YOURS

E JOHN PFOTZER
2109 EST
MGMCOMP MGM

TRIAL DIVISION

UNITED STATES COURT OF CLAIMS
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20005

November 16, 1979

Mr. E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

Ray Goddard, Esquire
Department of Justice
Civil Division
Washington, D. C.

Re: Edmond Pfotzer, et al. v. The United States, Ct. Cl. No. 274-72

Gentlemen:

As near as I can make out from the complicated administrative history of this case, the next step is for plaintiffs to file a motion for summary judgment for a review of the adverse decision of the Corps of Engineers Board of Contract Appeals. I shall await plaintiffs' submission accordingly.

Very truly yours,

/s/ C. Murray Bernhardt
C. MURRAY BERNHARDT
Trial Judge

Edmond and E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

September 19, 1981

The Honorable C. Murray Bernhardt
Trial Judge United States Court of Claims
717 Madison Place, N.W.
Washington, D.C. 20005

Re: Edmond Pfotzer, et al. v.
United States,
Court of Claims No. 274-72

Dear Trial Judge Bernhardt:

This is to respectfully advise that plaintiffs, in the subject action and as pursuant to the Court of Claims' "ORDER" dated May 15, 1981 (Exhibit A - attached) dismissing plaintiffs' petition, contemplate filing their petition for writ of certiorari in the Supreme Court of the United States (Exhibit B - attached).

Pertinently, plaintiffs inform the court that plaintiffs' review of their claims set out in their subject action as filed July 5, 1972 in the United States Court of Claims shows that Claim No. 1 as appears on pages 7 to 11 inclusive (Exhibit C - attached) and Claim No. 10 as appears on pages 70 to 78 (Exhibit D - attached) and as referenced to

"PLAINTIFFS' DEMAND FOR JUDGMENT"

pages 79 and 80 (Exhibit E - attached) [69a] have not been litigated.

Apropos of the foregoing: the record shows that in accord with this court's "ORDER OF TRIAL JUDGE STAYING PROCEEDINGS" filed December 7, 1973 (Exhibit F - attached) the Board of Contract Appeals ostensibly reconsidered appellants' unidentified appeal for reconsideration of the Board's basic adverse ruling of December 5, 1978 (pages 4 and 5 of Exhibit G) and on page 35 thereof the Board listed under its "Recapitulation", various claims and decisions as had been decided by the Board.

As pertinent to the listing as shown on page 35 of Exhibit G, it is clear that neither Claim No. 1 supra nor Claim No. 10 was heard and decided by the

Engineers Board of Contract Appeals and that these two claims are presently pending in the Court of Claims and such are prospectively to be amended to include claims for denial to plaintiffs of their right to procedural due process under applicable amendments to the United States Constitution.

In consideration of the foregoing: the question perplexing us is: whether until all our claims before the Court of Claims have been heard may we properly proceed to the Supreme Court of the United States upon a portion of our claims originally before the Court of Claims, without jeopardizing Claim No. 1 and Claim No. 10 as pending before the Court and prospective amendments thereto.

The problem stated next above arises

because following the Court of Claims' "dismissal of our petition", covering only a part of our claims before the Court, such dismissal, if it is to be appealed, must be followed by petition for a writ of certiorari within the allotted period, otherwise such right will be lost. Involved in the problem supra is the implication, or even the legal requirement incident to comparable appeals, that a petition to the Supreme Court for a writ should cover the full disposition of the entire action. In our case the latter aspect does not appear - and made so by the court's related remand and its subsequent disposition etc. (see Exhibit F and Exhibit H). Accordingly, there is todate an absence of final judgment dispositive of all of plaintiffs' claims

originally filed in this court.

Pursuant to the foregoing problem: our review of the law has not revealed a clear-cut answer. Specifically as to whether we must await this court's final decision on all pending claims originally filed before we may proceed to seek a writ of certiorari in the Supreme Court of the United States as involving the specific dismissal of our petition as covering a part of the claims as are referred to in Exhibit A and Exhibit B supra.

Presently we are not requesting legal advice as such: but we are in urgent need of your judicial enlightenment upon what appears to be a most infrequent problem, as stated supra, but one which probably has heretofore occasionally

developed before your court. However, we have been unable to find a ruling on point. Accordingly, we are obliged to request you endeavor to answer the following specific questions:

(1) To your knowledge, are we required to await the decisions of remaining Claim No. 1 and Claim No. 10 (Exhibits C and D) plus prospective amendments, to our original petition in the Court of Claims; and if ultimately required a possible petition for writ of certiorari pertinent to them in the Supreme Court; or

(2) May we presently seek a writ of certiorari in the Supreme Court as related to the claims involved in Exhibit A and Exhibit H without correlatively foreclosing ourselves from potentially filing a petition for writ of certiorari in the

Supreme Court of the United States as relating to the pending Claim No. 1 and Claim No. 10 etc. supra in the Court of Claims.

Please let us hear from you at your earliest convenience. Thank you.

Very truly yours,

/s/ E. John Pfotzer
E. John Pfotzer

cc: Ray Goddard, Trial Attorney
Commercial Litigation Branch
Civil Division
United States Department of Justice
Washington, D. C.

FRANK T. PEARTREE
CLERK

OFFICE OF THE CLERK
UNITED STATES COURT OF CLAIMS
717 MADISON PLACE, N. W.
WASHINGTON, D.C. 20005

September 24, 1981

Mr. E. John Pfotzer
P. O. Box 987
Wilmington, Delaware 19801

In re: Edmond Pfotzer, et al.
v. The United States
No. 274-72

Dear Mr. Pfotzer:

I return herewith the enclosures received under cover of your letter of September 19, 1981, addressed to Trial Judge Bernhardt.

The court's order of February 6, 1981, dismissed the petition en toto in the above-entitled case. The case is no longer a pending one before this court.

Sincerely yours,

/s/ Frank T. Peartree

Clerk

Enclosures

APPENDIX-TABLE OF CONTENT

RE: PLAINTIFFS' MOTION FOR THE COURT'S ORDER VACATING ETC. ITS JUDGMENTS OF FEBRUARY 6, 1981 AND MAY 15, 1981

APPENDIX

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11. Pertinent excerpts from transcript of pre-trial hearing of April 8, 1978 before Corps of Engineers Board of Contract Appeals; and as referenced to "PLAINTIFFS' REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT" as filed on October 17, 1980.....47 to 52

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Hon. Horace C. Reosti :Re: Appeals of E.
Administrative Judge :& E.J. Pfotzer
Department of the Army:Appellants, Con
Office of the Chief :tract No. DA-49-
of Engineers :080-Eng-27, Dale
Washington, D.C. 20314:carlia Filters,
:Docket No. C&A
:500 Etc.
(and U.S. Court of Claims
Action No. 2618
June 20, 1978

RE: RESPONDENT'S DELAYED RESPONSE TO APPELLANT'S COMPLAINTS

The Board's consideration is herein respectfully requested to appellant's letters addressed to the Board, with copy thereof to respondent Government trial attorney, under date of March 18, 1978 and

April 4, 1978 (copies attached). These letters cover transmittal therewith of eleven amended formal complaints in the subject action, each set forth in comprehensive substance, and detail. All such claims are as presently before the Board for its processing under applicable provisions of specific Board rules set forth on page one, paragraphs (b), (c), (d) and (e), copies thereof attached; and also as conforming to understanding reached by the parties and the Board at pre-hearing conference under date of April 8, 1975, and as supplemented by follow-up conference of August 17, 1977.

In connection with the foregoing appellants advise that to the present date it has received no response to any of these complaints from respondent, as here-

in referenced rules intend should have been timely forthcoming, as thereby in conformity with the basic rules premise, "x x x to secure a just and inexpensive determination of appeals without unnecessary delay."

As consonant with the above representations appellants protest the evident disregard of the basic rules procedure in respondent not having timely answered the subject complaints thereby negating appellants most substantial forward efforts, and such disregard most seriously prejudicial to appellants proper interests in orderly and expeditious pre-hearing proceedings, and as thereby unduly adding greatly to the expense of the proceedings, as well as to the time required for the hearings.

By reason of the above considerations appellants request they be promptly informed as to the approximate dates upon which respondent may be expected to forward its responses, in order that appellant may thereafter timely adjust its hearing preparations consistent therewith. Further, it would be most helpful for the subject responses be forwarded appellants singly as completed rather than the entire group combined.

Respectfully submitted,
E. & E. J. Pfotzer
Appellants pro se

/s/ E. John Pfotzer
E. John Pfotzer

cc: Della K. McKnew, Esq.
District Counsel

Howard A. Pollack, Esq.
Government Trial Attorney

DAEN-CCB 22 June 1978

Howard A. Pollack, Esq.
Government Trial Attorney
U.S. Army Engineer District, Baltimore
Baltimore, Maryland 21203

Re: Appeals of E. & E. J. Pfotzer
Docket Nos. Eng C&A 500 etc.

Dear Mr. Pollack:

Reference is made to correspondence dated June 20, 1978 from appellant concerning the government's response to appellant's complaints. Unless answers to the amended complaints are received within 30 days the Board will enter a general denial on behalf of the government in accordance with Rule 6b of the Board's Rules.

Sincerely yours,

HORACE C. REOSTI
Administrative Judge
Member of the Board

Copies furnished:
Mr. E. J. Pfotzer
DE North Atlantic Division
Gary W. Hudiburgh, Esq.,
DAEN-CCF OCE

APPEAL OF MORGAN CONSTRUCTION COMPANY

IBCA—253 *Decided September 20, 1960*

Contracts: Appeals

Contractor-appellant has a contractual right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal." This right must be honored even if amount of claim involved is small. Parties may stipulate to submit appeal "on the record."

BOARD OF CONTRACT APPEALS

Department Counsel has moved on September 9, 1960, that the Board should

dismiss Claim No. 2 of the Contractor, and permit sworn statements to be supplied the Board by both parties in lieu of conducting a formal hearing in this case on Claims Nos. 1 and 3, following a statement of *factual issues* by the contractor and accompanied by a supplement to this statement when such information is supplied by the contractor.

Appellant's appeal dated July 22, 1960, sets forth three reasons why the Findings of Fact and Decision of the contracting officer of June 16, 1960, should be deemed to be erroneous. These reasons are, in summary, as follows:

1. frost conditions which existed prior to January 6, 1960 which "were beyond the control of the contractor and which caused a delay in the work."
2. "unnecessary supervision."
3. failure of the contracting officer to consider the effects of a cancelled, "premature" resumption of work order.

These are all factual issues regarding which the contractor-appellant has a contractural right to "be afforded an opportunity to be heard and to offer evidence in support of its appeal." [1] As appellant has specifically requested a hearing, and as his claims seemingly fall into the category of disputes "concerning a question of fact," the motion to dismiss Claim No. 2 is denied.

It is noted in connection with this denial that proceedings before the Board on appeals are *de novo*.[2] Further, should it appear during the proceedings that the contracting officer has not passed in a decision on a particular fact, then the matter will be remanded to the contracting officer.[3]

Department Counsel also alleges that the amount in dispute is $1,400 and that the

[3] *Cf. James Lumber Company*, ASBCA No. 1991 (March 31, 1954).

[4] *Utah Construction Company*, IBCA-133, 140, 67 I.D. 248, 256 (1960); *Francis O. Day Company, Inc.*, IBCA-178 (December 4, 1959); *General Excavating Company*, IBCA-150 (May 25, 1959); *Economy Pumps, Inc., Division of C. H. Wheeler Manufacturing Company*, IBCA-94 (February 13, 1957).

Government would prefer in view of the small amount involved to have submitted sworn statements on behalf of the Government and appellant, respectively, thus avoiding the cost both to the Government and appellant of a formal hearing. The Government does not make this recommendation in any spirit of denying the contractor a full opportunity to present his case but rather makes it for the reason that expense to both parties can be minimized by this procedure. * * *

This course of action seems to be desirable, indeed. However, the Board has no power to compel the appellant to follow this course of action as it has a contractual right to a hearing, regardless of the amount of the claim involved. Hence, the Board denies the motion in so far as it concerns further procedures concerning Claims Nos. 1 and 3.

However, nothing prevents Department Counsel from obtaining approval of the appellant or his attorney to the course of action, which he proposes.

A copy of the statement of the Government's position, including Department Counsel's arguments on this point, has been served on the appellant. Hence, in view of the small claim involved and the expenses connected with the holding of a hearing, the Department Counsel should contact appellant, or his attorney, with a view to negotiate, if possible, a stipulation to the effect that the matter may be considered by the Board solely on the record. However, during the negotiations, it should be made clear to the appellant that full opportunity will be given to him to present his case on the record by means of written statements and affidavits, if he so desires. No formal appearance has been noted as to appellant's counsel, mentioned in the Statement of Government's Position, as being Martin J. Andrews, Esq., Denver, Colorado, and as having participated in proceedings before the contracting officer.

If appellant is not represented by counsel, Department Counsel should offer to assist the appellant in the solution of problems connected with procedures involved in the submission of statements and affidavits "on the record" not "because of any legal requirement to do so, but as a matter of sound administrative policy."[4] It is the opinion of the Board that such assistance in procedural matters is not violative of the statute prohibiting assistance by a Government employee in the prosecution or support of a claim against the United States "*otherwise than in the proper discharge of his official duties* * * *." (Emphasis added.)

PAUL H. GANTT, *Chairman.*
THOMAS M. DURSTON, *Member.*
JOHN J. HYNES, *Member.*

UNITED STATES v. J. HUBERT SMITH

A-28387 *Decided August 1, 1960*

Mining Claims: Contests—Rules of Practice: Government Contests—Regulations: Waiver

Under the Department's rules governing Government contests against mining claims, where an answer to a complaint is filed late the allegations of the complaint will be taken as admitted by the contestee and the case decided without a hearing by the manager, and the Secretary is without authority to waive the rules to permit the late filing of the answer.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. Hubert Smith has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated February 2, 1960, which affirmed a decision of the manager of the Denver, Colorado, land office, dated May 29, 1959, declaring his lode mining claim, The Blue Sky Lode Mining Claim, to be null and void for the reason that an answer to the complaint against the claim was not timely filed.

The facts are that a complaint was served on the appellant on March 4, 1959, in a contest which was initiated by the United States Forest Service of the Department of Agriculture. The complaint alleged that no discovery of valuable deposits of mineral had been made within the limits of the claim and that the lands comprising the claim are nonmineral in character.

The rules of practice of the Department governing private contests provide that a contestee "must" file an answer within 30 days

[1] *Cf. The Eagle Constr. Corp.*, IBCA-230 (July 18, 1960); *Truax Mach. & Tool Co.*, IBCA-195, 59-2 BCA par. 2280, 1 C.C. par. 563 (1959); *C. H. Wheeler Mfg. Co.*, IBCA-127, 66 I.D. 382, 58-2 BCA par. 1905 (1958); *Zinsco Elec. Products*, IBCA-104, 57-1 BCA par. 1260 (1957); *Carl W. Pistor*, IBCA-81, 56-2 BCA par. 1125 (1956); *Schmitt Steel Co.*, IBCA-29, 6 CCF par. 61,719 (1955); *The Pelton Water Wheel Co.*, IBCA-16, 62 I.D. 385, 6 CCF par. 61,705 (1955). *Accord*, 39 Comp. Gen. 343, 348 (1959). In that decision the Comptroller General states that "clause 5(c) of Standard Form 23A should be construed as evidencing an intention to hold the contractor responsible for delays of subcontractors or suppliers unless the delays were due to causes which could not have been foreseen by either the contractor or the subcontractor or supplier."

after service of a complaint upon him and that if an answer is not filed as required "the allegations of the complaint will be taken as admitted by the contestee" and the case decided without a hearing. 43 CFR, 1959 Supp., 221.64, 221.65. Another rule provides that proceedings in Government contests "shall be governed" by the rules relating to private contests, with exceptions not material here. 43 CFR, 1959 Supp., 221.68.

Thus, the appellant was required to file an answer to the complaint within 30 days after March 4, 1959. The appellant's answer was not filed until April 16, 1959, thirteen days late, although the complaint served on him expressly warned him that if he did not file an answer within 30 days the complaint would be taken as admitted and the case decided without a hearing. A copy of the rules of practice was attached to the complaint.

In his appeal the appellant states that he employed an attorney in Alamosa, Colorado, to answer the complaint, whereas he resides in Manassa, Colorado; that although the answer was prepared, the appellant was not in Alamosa until April 15, 1959, at which time the answer was mailed; and that failure to file the answer was due to inadvertence and oversight on the part of his attorney.

In a recent decision, *Earl D. Deater* v. *John C. Slagle*, A-28121 (May 24, 1960), the Department held that under the rules of practice where an answer to a complaint in a private contest is filed one day late the allegations of the complaint must be taken as admitted by the contestee and the case decided without a hearing, and that the Secretary is without authority to waive the rules to permit the late filing of the answer since the Secretary is without authority to disregard the plain and unambiguous provisions of his own regulations. *McKay* v. *Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955); *Chapman* v. *Sheridan-Wyoming Coal Company*, 338 U.S. 621 (1950).

Under the rule announced in the *Slagle* case, the appellant's mining claim was properly declared to be null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

GEORGE W. ABBOTT, *The Solicitor.*

By: EDMUND T. FRITZ,
Deputy Solicitor.

(Paragraph 2692) Cited 60-2BCA

FLORA CONSTRUCTION COMPANY

IBCA No. 180, Interior Appeals Panel, June 1, 1960. Contract No. 14-06-100-1111.

Pertinent excerpts from the foregoing are included infra.

Contractor's Right to Hearing

Despite the long delays in the prosecution of this claim, the Board granted the contractor's request for a hearing and requested that the parties submit to the Board within thirty days statements proposing the place and time of the hearing. In denying the Government's proposal that the Board determine the appeal on the basis of the record before it because of the length of time that had elapsed and the contemplated difficulty of producing witnesses, the Board noted that the reasons for the delay were not wholly the fault of the contractor, and its contractual right to a hearing could not be defeated by the circumstances noted by the Government.

And further, from page 13,591:

It is the opinion of the Board that the contractual right of an appellant to a hearing cannot be defeated by the circumstances mentioned in the letter of April 22, 1960, and has not been lost by reason of the failure to submit a

request for a hearing during the period of approximately a year that elapsed between submission of the statement of the Government's position and the first indication that a hearing was desired. While the appellant's inaction in this respect would have justified the Board in deciding the appeal on the record during the interim, lack of manpower has prevented it from attempting to do so.

In view of these facts, the request for a hearing seems timely and must be honored if a factual dispute exists between the parties, as it does in the instant case.

Hence, the Board enters the following

Order

The request of appellant to hold a hearing is granted. The parties are requested to submit to the Board, within 30 days after the receipt of this order, statements proposing the place and time of the hearing.